

THE IMPACT OF MEDIA VIOLENCE ON CHILDREN

HEARING

BEFORE THE

COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

—————
JUNE 26, 2007
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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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CONTENTS

	Page
Hearing held on June 26, 2007	1
Statement of Senator Dorgan	60
Statement of Senator Klobuchar	7
Statement of Senator Lautenberg	5
Statement of Senator Rockefeller	1
Prepared statement of Kevin W. Saunders, J.D., Ph.D., Professor, Michigan State University College of Law, prepared statement	65
Statement of Senator Smith	7
Statement of Senator Stevens	4
Statement of Senator Sununu	6
Statement of Senator Thune	63

WITNESSES

Kunkel, Ph.D., Dale, Professor, Department of Communication, University of Arizona	17
Prepared statement	19
Liguori, Peter, President, Entertainment, Fox Broadcasting Company	14
Prepared statement	16
McIntyre, Jeff J., Senior Legislative and Federal Affairs Officer, Public Policy Office, American Psychological Association	21
Prepared statement	23
Tribe, Laurence H., Carl M. Loeb University Professor, Harvard University, Professor of Constitutional Law, Harvard Law School; on behalf of the Ad Hoc Media Coalition	25
Prepared statement	27
Winter, Timothy F., President, Parents Television Council	8
Prepared statement	11

APPENDIX

Cantor, Ph.D., Joanne, Professor Emerita, University of Wisconsin-Madison; on behalf of the Center for Successful Parenting, prepared statement	80
Copps, Hon. Michael J., Commissioner, Federal Communications Commission (FCC), prepared statement	75
Inouye, Hon. Daniel K., U.S. Senator from Hawaii, prepared statement	75
Letter, dated June 26, 2007 from Americal Civil Liberties Union to Hon. Daniel K. Inouye and Hon. Ted Stevens	87
Letters, dated June 25, 2007 from the Association of National Adver- tisers, American Association of Advertising Agencies and the American Advertising Federation to Hon. Daniel K. Inouye	77
National Association of Broadcasters, prepared statement	91
Pryor, Hon. Mark, U.S. Senator from Arkansas, prepared statement	75
Representatives of Program Networks	102
Response to written questions submitted by Hon. Daniel K. Inouye to:	
Dale Kunkel, Ph.D.	111
Peter Liguori	113
Jeff J. McIntyre	103
Laurence H. Tribe	109
Timothy F. Winter	105
Response to written questions submitted by Hon. Bill Nelson to:	
Dale Kunkel, Ph.D.	112
Peter Liguori	115
Jeff J. McIntyre	104
Laurence H. Tribe	110

IV

	Page
Response to written questions submitted by Hon. Bill Nelson to—Continued	
Timothy F. Winter	107
Response to written questions submitted by Hon. Mark Pryor to:	
Dale Kunkel, Ph.D.	112
Peter Liguori	115
Jeff J. McIntyre	104
Laurence H. Tribe	111
Timothy F. Winter	108

THE IMPACT OF MEDIA VIOLENCE ON CHILDREN

TUESDAY, JUNE 26, 2007

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 10:10 a.m. in room SR-253, Russell Senate Office Building, Hon. John D. Rockefeller IV, presiding.

OPENING STATEMENT OF HON. JOHN D. ROCKEFELLER IV, U.S. SENATOR FROM WEST VIRGINIA

Senator ROCKEFELLER. This hearing will come to order. Senator Inouye, the Chairman of the Committee, has asked me to open this morning's hearing on the impact of media violence on children.

I'm very pleased to welcome our witnesses today. I know many of you have traveled from across the country to be here today.

Before I start, I would like to mention that FCC—Chairman Kevin Martin could not be here today. He wanted to be here, was planning to be here, but his several day old young son, as of last night, remains in intensive care, and so, it is entirely understandable that he would not be here. So, we wish he and Catherine and the little boy, William, all the best.

I also have to recognize the work of Commissioner Copps on this issue. Unfortunately, Commissioner Copps also could not be here today, due to other, as they say, pressing FCC business. But he has been a genuine leader and an advocate on this issue, as I think most of you know.

The issue of protecting children from indecent, violent, and profane content is a deeply personal and important issue to this Senator. Last Congress, I introduced legislation to address this issue, and I will do so again in the coming weeks, and I will keep on doing so until something happens.

After years of inadequate and ineffective voluntary efforts by the industry, we are no closer to solving the problem of indecent and violent programming for children, despite the claims that parents have many tools at their disposal to address unwanted programming.

Children today are being subjected to an unprecedented level of violent television content. There's no doubt it is coarsening our culture, probably debasing our culture. I fear, too, that it is weakening our society, as a whole.

For too long, we have heard promises to do better. They come in various forms, in various amounts, to put better tools in the hands

of parents, to provide more options for families, but none of this has yielded any results; instead, we have the industry blaming parents—interesting—for their lack of oversight of children’s television viewing. I think this is cowardly. We have a responsibility to do better, all of us, a responsibility the Government must take seriously.

I hold the entertainment industry responsible for this. Decades of scientific research have shown that violent television and programming has a detrimental impact on the development of children, yet today the content industry is in a never-ending race to the bottom; indeed, one questions whether there is a bottom somewhere, anywhere, these days.

I’m not sure that all of my colleagues know how violent programming in television has become, and, immediately following my statement, with the permission of the distinguished Ranking Member, I’m going to show a 5-minute video that expresses some of what I’m talking about. At my request, the Parents Television Council has put together this CD with clips from broadcast and cable channels that show shocking, violent images. It will not be pretty. These images are inherently disturbing to adults, so imagine what they might be for children.

Interesting article in *he Washington Post* this morning, I believe it was, on the effect, of the war, on Iraqi children. This is a little bit different, but, then again, is it?

I know some of our witnesses will go into far greater detail, but let’s consider these facts. Children watch an average of between 2 and 4 hours of television every day. The occurrence of violence on television has increased by 75 percent since 1998, and has increased across the board on all five of the major broadcast networks. On average, American youth view more than 1,000 murders, rapes, and assaults each year on television. I repeat: On average, American children view more than 1,000 murders, rapes, and assaults each year on television. Sadly, by the time our children leave elementary school, they will have seen on average 100,000 acts of violence on television.

When I am at home, I meet with West Virginia parents and educators, and they’ve told me that children’s behavior is becoming more aggressive, and, at times, crude or explicit—they’ve noticed the change, and they’ve noticed it recently—and that they blame television for much of the problem. Television blames them. They don’t share that view.

I’ve met with many representatives from the entertainment industry, representing broadcasters, cable, movies, and others. The one thing every CEO never fails to tell me is that they are personally appalled by the violent content on television, and they personally agree with me, and, if they could change it, they would. But yet, I never get a reason as to why the industry will not stop showing violent content, which would sort of solve the problem.

Violent content is cheap to produce. Violent content is profitable. Violent content sells. The entertainment industry could change what we watch on television, but it chooses to sell sex and violence instead. I reject the notion that television merely reflects our society. I reject that, whole cloth. But, rather, I believe that television can and should be a positive, so to speak, force. That does not

mean all happy, but realistic, fundamentally constructive, laying a base.

To be blunt, the big media companies have placed a greater emphasis on their corporate short-term profits than on long-term health and well-being of our children. Instead of addressing the problem, too much violent programming on television—that being the problem—the industry seeks to hide behind ineffective Band-Aids of voluntary action. I remember \$250 million advertising programs about the V-Chip, that had a big effect in West Virginia, to people that—whose sets had no effective way of control if they were bought before 2000, which most of them would have been. They said they provided parents more tools. Parents do not want more tools. They want the content off the air.

It's no big secret that the industry has hoped that its latest voluntary campaign will stave off Congress from establishing common sense content-and-ratings regulation for television. I know that we will hear their now-familiar arguments here today. The entertainment industry will claim that voluntary actions are sufficient. They always have. I'm sure they will continue to. Or they will blame the parents. And they are only giving the public what it wants to view, while giving parents all the tools necessary to block unwanted programming, assuming, of course, that the parent is always there, that the two parents aren't working, and all of those other things which are casually tossed aside. But none of these arguments are persuasive enough to convince this Senator to abandon a serious effort to protect children from unconscionable levels of sex and gratuitous violence on what remains the most pervasive, inescapable means of communication in America, which is television. Nothing else comes close.

We now know that the entertainment broadcasting industry has proven itself unable, and unwilling, to police itself. I fear that graphic, violent programming has become so pervasive, and has been shown to be so harmful, we are left with no choice but to have the government step in. I know that Congress has been reluctant to take on the issue of violence, because defining decency is difficult. I will, again, reintroduce my legislation, because we must address this issue. I understand these are hard lines to draw. But, just because they're difficult, doesn't mean that we should stand by and do nothing. We can find these lines, and put bright markers on them.

For the sake of our children and grandchildren, we have a moral obligation to tackle television violence and arm our parents with the tools to make their children safer, but, again, that is easier said than done.

There are many, many parents who are very literate, computer and otherwise, who cannot make those things work. And, plus, they're also often not there to check.

The real question for all of us today is, what are we going to do about protecting our children from the pervasive and escalating level of television violence? Doing nothing, to this Senator, is not an option.

I would call now on the Ranking Member, Senator Stevens.

**STATEMENT OF HON. TED STEVENS,
U.S. SENATOR FROM ALASKA**

Senator STEVENS. I thank you very much, Mr. Chairman.

As a father of six, and grandfather of 11, more coming, and more great-grandchildren coming soon, I share your feelings about this. But I think we have to tread a lot softer than you indicate we can, because the constitutional restraints that have been imposed upon us in the past will certainly be brought upon us if we go too far, in terms of trying to regulate this industry, which is so vast and so diverse now, it could—you could pull down movies on your computer, sitting at a desk, while your parents think you're studying. You can pull them down on an iPod. There are so many different ways to get to movies, other than broadcasting and cable, today, that the whole question comes down, I think, to, really, the movie industry itself, although, even there, there are portions of the industry that are making movies that are not subject to the restraints that were self-imposed on the movie industry. I think that Jack Valenti, our late friend, started a process of trying to educate Americans, and particularly parents, on how they can control what their children watch in their home. I don't know that even that's effective in trying to control what they watch on their iPod or on their computer, on the various devices that are available today.

Clearly, the Supreme Court has laid down some guidelines in the past, and I fear that, if we go beyond the concept of trying to make sure we have a rating program that works, and a program that works, as far as giving parents every tool they need to protect the smaller children, by the time they get to the teens, they've got all these devices today that give them access to—actually, to broadcasts from outside of our country. It is not something that's easily regulated. And the more that we put down too harsh rules on the television that's in their home, the more they're going to acquire the facilities and the capability and the technology to watch what they want to watch.

I think there is a little bit of education involved here, as far as parents are concerned—a lot of it, as a matter of fact. I've told you the story of my attempt to restrain my children from watching programs. You'll recall that. I just didn't buy the television.

[Laughter.]

Senator STEVENS. And, as you know, I—the mayor lived about three houses down on the block, and he finally stopped me and said, “Stevens, why are your kids—why are your kids always in my front room?”

[Laughter.]

Senator STEVENS. He had a television. Now, a simple matter is that children will go where they want to go, to watch what they want to watch, if their parents don't put them on a leash. Now, as a practical matter, what we've got to do is be mindful of the Constitution and do our best to put down the kind of regulation that will work.

I do hope that we can achieve that. And I'm anxious to hear, really—I heard you say that you don't believe it has accomplished anything—I think the program that Jack Valenti started, after our three listening sessions in the last Congress, has had some effect,

and I'm anxious to hear, really, if they have any real good statistics on that.

But I admire you holding the hearing. I hope we can bring about some change, but I'm fearful of going too far and losing control altogether.

Thank you.

Senator ROCKEFELLER. The Chair, with the permission of his colleagues, would make one observation, and that is that the iPods and all the rest wouldn't be affected, either, if the content wasn't made, in the first place. You stop making it, it doesn't—you can't download it, or anything else.

Second—

Senator STEVENS. Now you're talking about regulating the movie industry.

Senator ROCKEFELLER. Second, I would actually like, now, to put on the 5-minute video, which was done to buttress, in a sense, what I'm talking about. And I hope that won't offend anybody; the statements will continue directly after that, but I'd like to make that point while we still have members.

[Video presentation.]

Senator ROCKEFELLER. We can stop it there.

The next speaker will be Senator Lautenberg.

**STATEMENT OF HON. FRANK R. LAUTENBERG,
U.S. SENATOR FROM NEW JERSEY**

Senator LAUTENBERG. Thanks, Mr. Chairman. I don't mean to cutoff our entertainment.

The subject is complicated by real life. That's the problem. When you look at the volume of interest in *The Sopranos*, it tells you something about human appetites. And where does it start? It starts in the home.

Mr. Chairman, you said some very interesting things. One of the things, that sounded like it was in passing, was, "The parents are not there." That's the bigger problem, in many ways, in my view. Yes, the industry shouldn't be feeding on this prurient kind of thing. If you go to a theater today to see a movie, invariably, the previews of shows yet to come are the most violent little clips you've ever seen. But we tried regulating behavior before. It was called Prohibition. And it didn't endure, because the public appetite was not there to support it.

I agree, I have ten grandchildren, I hate the thought of them watching this kind of, what I will call, "trash." But to see what interest there is. ask the hotel industry—I did—when having films shown on the room TV, and you'll find out that it's sex and violence in abundant numbers, a larger percentage of those than any other direct subject.

So, we've got to figure a way through this terrible problem. It is vulgar. It is discouraging. And, when you see something like this, very frankly, I've got to tell you, I turn it off, for me, when it happens. I just can't stand the fact of that kind of depravity ruling our behavior.

So, you're absolutely right, in terms of what we have to do about it. The thing that we have to also include, however—and Senator Stevens mentioned it—we've got broadcasts and video games. I

have a friend who operates one of the biggest bookstore chains in the country, and he says the biggest growth in their industry are stores that just deal with video games. Well, video games—I haven't yet heard a survey of what the interest is in violent video games, but I know, from seeing kids around, that there is great interest there. So, how do you curb that appetite, as well as asking the industry to please, please try to do something that doesn't violate our ability to speak out on issues. But, somehow or other, we've got to deal with a public appetite that goes way beyond our ability to control it by behavioral recommendations here; V-Chips, all those things. Maybe the Government ought to be sending out, in a routine mailing, or some communications mechanism, about the fact that you ought not—that, "Here are ways you, parents, can stop it, you, guardians, can stop, some of the violent things that we've seen."

But, my friends, I'll close with this. If you see anything more violent than the war in Iraq, and try to understand why it is that we can't see flag-draped coffins coming in, because we don't want people to see the violence that is brought upon our society, there is something terribly hypocritical about the whole thing. And we have to approach this in a realistic fashion.

I thank all of you for being here, and plead for your partnership. Let us know what you think we can really do about this, instead of satisfying the basic instinct, because if that's what we're going to do in our society, we're going to be a lot uglier than we are today.

Thanks, Mr. Chairman, I appreciate it.
 Senator ROCKEFELLER. Senator Sununu?

**STATEMENT OF HON. JOHN E. SUNUNU,
 U.S. SENATOR FROM NEW HAMPSHIRE**

Senator SUNUNU. Thank you, Mr. Chairman.

I certainly concern a—or share a number of the concerns that you expressed in your opening statement, but I don't believe that Congress is necessarily reluctant to take on the issue. It seems to me we spend a great deal of time talking about this very issue, and in the last session we spent a great deal of time on the floor of the Senate, and, I think, in the House, trying to address, quote, "this issue," through legislation.

I think the difficulty, however, is, as Senator Lautenberg points out, it's difficult and it's complicated. Anytime we try to address, with quality or form or content of what's being broadcast or distributed by other means, you run into First Amendment questions—genuine, important First Amendment questions—that have to be dealt with; you run into questions of private carriage, private property rights, and what the owners of certain networks have in the way of rights that need to be protected; and you run into the issue of defining what is meant by "inappropriate," "indecent," "illegal." And it's very difficult—as much as we might be bothered or disappointed in what we see on different networks, or broadcast through different medium, it's very difficult to solve all those problems, or address all those concerns, with another rule, another regulation, or another law.

I certainly hope that the panel we have in front of us might be able to provide some guidance or some clarity. There might be things that we can do more effectively, or the FCC can do more effectively to enforce existing legal and constitutional standards, but it's a very difficult issue. And, as much as I might share many of the concerns raised in your opening statement, I can't, for the life of me, figure out how it is that showing what the Chairman believes to be indecent material on national TV at 10:35 in the morning is going to solve the problem. So, I hope we focus on what might be done to improve current regulation or enforcement of current laws, what might be done to improve those standards in a way that's consistent with the Constitution and consistent with private property rights, and, at the same time, I think, like anyone that has children or grandchildren, you recognize how important the guidance that we give to those children really is, because there is no rule, law, or regulation that can strike from the world, the airwaves, broadcast medium, everything that we, as an individual, feel uncomfortable about, or don't like, or don't think really reflects the kind of values we want young people to have as they grow up.

Thank you, Mr. Chairman.

Senator ROCKEFELLER. Thank you.

Senator Smith?

**STATEMENT OF HON. GORDON H. SMITH,
U.S. SENATOR FROM OREGON**

Senator SMITH. Thank you, Mr. Chairman.

This is a very important hearing. There are two principles, I think, that are—we need to bear in mind as we deal with anything touching on the First Amendment, and especially as it relates to children. First of all, the Federal Government can be no substitute for good parenting. And, second, we, as parents, currently have—perhaps we need to improve the types of monitoring devices that we have in order to facilitate good parenting so that they can be the monitors of their—of what their children watch.

Last, Mr. Chairman, a concern that I have about the whole *à la carte* approach is that the current business model, if it is removed on a *à la carte* channel approach, is simply that many of the children's programs, which are not violent, which are very good, are dependent upon, frankly, the success of other channels that are available. I suspect we will lose a number of children's programming if we go to an *à la carte* business model. That's my concern about some of the proposals that are out here.

So, thank you for the hearing, and I look forward to hearing our witnesses.

Senator ROCKEFELLER. Senator Klobuchar?

**STATEMENT OF HON. AMY KLOBUCHAR,
U.S. SENATOR FROM MINNESOTA**

Senator KLOBUCHAR. Thank you very much, Mr. Chairman, for holding this important and timely hearing. And I look forward to talking about the impacts of violence on children, as well as how we, in Congress, can craft practical and thoughtful solutions.

As a former prosecutor and a mother of a 12-year-old, I've seen, firsthand, some of the violence that our kids are exposed to, not

only on TV, but also, sadly, with some of the cases that we have seen in their own lives and in their own neighborhoods. I'm fortunate enough to have a daughter who's the ultimate self-censor. I took six 12-year-old girls to see "Nancy Drew" on Saturday night, and my daughter spent the entire movie watching it like this. But, that aside, I do think, as Senator Smith was saying, that parents are our best and first line, but no technology or time channeling system is really going to take place of a parent, who is our own best V-Chip.

That being said, in my role as a prosecutor I saw many families that didn't have that situation, where a parent was there all the time, or there would even be families where both parents were doing everything they can, or a single parent who's doing everything they can, but they're not home in the afternoon when their child gets home from school. And so, that's why I am interested in seeing, and welcome ideas about how Congress, as well as the FCC and the entertainment industry, can enact meaningful ways to protect our kids from violent images. But we need to act thoughtfully, in a way that protects our kids, and in a way that we don't just put something out there, knowing that it'll get thrown out in court.

Commissioner Copps stated, in his statement accompanying the FCC's April 2007 report, he said, "I, for one, proceed acutely sensitive to the need for a carefully crafted approach. I want to see a solution that solves the problem without creating others."

I think that's what we want to do here. I think we should consider thoughtful and meaningful ways to protect our kids.

I thank you, Mr. Chairman, and I look forward to hearing from the witnesses.

Senator ROCKEFELLER. Thank you, Senator.

Our panel—and there is just one—is Mr. Tim Winter, who is President of the Parents Television Council; Mr. Peter Liguori, who is President of Entertainment of FOX Broadcasting Company; Dr. Dale Kunkel, who is Professor of Department of Communication at—

Dr. KUNKEL. University of Arizona.

Senator ROCKEFELLER.—University of Arizona; Mr. Jeff McIntyre, Senior Legislative and Federal Affairs Officer, Public Policy Office, American Psychological Association; Mr. Laurence Tribe, Carl M. Loeb University Professor, Harvard Law School.

Mr. Winter?

**STATEMENT OF TIMOTHY F. WINTER, PRESIDENT,
PARENTS TELEVISION COUNCIL**

Mr. WINTER. Good morning, Mr. Chairman, Mr. Vice Chairman, Senators. Thank you for inviting me to be here with you this morning. And, Mr. Vice Chairman, it is a special honor for me to be here before this Committee, on whose staff I had the pleasure to serve under your good friend and former colleague Senator Warren Magnuson.

My name is Tim Winter, and I am President of the Parents Television Council. With almost 1.2 million members across the United States, the PTC is a nonpartisan, nonprofit, grassroots organization dedicated to protecting children and families from graphic sex, violence, and profanity. Many in the Congress know of the PTC most-

ly as a vocal advocacy group, but the lion's share of our efforts go into research and education. The PTC monitors every hour of prime-time broadcast entertainment programming and a growing amount of original cable programming.

PTC media analysts enter, into a powerful computer database, every instance of sex, violence, profanity, disrespect for authority, and other program content that parents might find harmful to their children, and we make that information available, free of charge, on our website, so that parents and families can make more informed media choices.

So, in the course of our work, Mr. Chairman, we, at the PTC, see pretty much everything. And when it comes to media violence, on television especially, the trend of what we're seeing today is not only concerning, it is frightening.

This past January, the PTC released this report, called "Dying to Entertain." It analyzed the volume and degree of violence on prime-time television. The television season which just concluded last year was the most violent that PTC ever recorded, averaging 4.41 instances of violence per hour during prime time, or one instance every 13 and a half minutes, an increase of 75 percent since the 1998 television season. Over the course of a year, that means thousands of violent depictions are broadcast over the public airwaves when millions of children are in the audience.

In addition to the marked increase in the quantity of violence, we are seeing several other very disturbing trends:

First, the depictions of violence have become far more graphic, as we saw, far more realistic than ever before, thanks, in part, to enhanced computer graphics and special effects employed in television production today.

Second, there is an alarming trend for violent scenes to include a sexual element. Rapists, sexual predators, and fetishists appear with increasing frequency on the prime-time programs.

Third, we are now seeing the protagonist, the person the audience is supposed to identify with, as the perpetrator of the violent acts.

And we are also seeing more children being depicted as the victims of violence.

As you know, we prepared the DVD with the scene sampling. The scene where we saw the sniffing of the drugs off the sliced-open intestines, aired this last May 22nd, is called "NCIS," on CBS. And this aired at 8 p.m., 7 p.m. Central. And, Senator, that show did not have a "V" violence descriptor, so the V-Chip would not have worked, if a parent had attempted to set it.

On an episode of "CSI" that we did not see, which normally airs at 9 o'clock Eastern, but often is repeated earlier in the evening, there was a scene on that tape where a woman, who had been having sex with her son for many years, and then her son became a psychotic serial rapist and was institutionalized, the mother took a job as a nurse at the institution so that she could continue to have sex with him. When she learned that her son was having sex with one of the male inmates, she killed the man, then had her son cover up the crime by bashing the dead man's head into the ground until it became a bloody, unrecognizable mess. Along comes an-

other inmate, rubs his hands in the blood, and then hungrily smears it over his face as if he wants to devour it.

The scene where we saw the forced oral rape, the man performing that oral rape was a police officer. The show is called “The Shield,” which began on expanded basic cable, and now airs in syndication on broadcast television. *The Shield* regularly features some of the most graphic violence, and, in particular, sexually graphic violence.

The creator of another series on that same network, FX, Ryan Murphy, publicly stated that it might be his legacy to make possible a rear-entry sex scene on broadcast television. And, Senators, if you subscribe to a cable to satellite service, you are forced to pay almost \$9 a year to the FX network so they can produce and air that kind of content.

Eighty million Americans are also forced into that bundling scheme. And, as FCC Chairman Martin rightfully pointed out, that if a family must continue to pay for entertainment programming even when they object to it, there is little or no incentive for the programmers to change.

As troubling as these content examples are, Senator, I am equally dismayed by the seeming contempt the industry has for anyone who would suggest reasonable restraint. Recently, the CEO of Time Warner decried this hearing, likening it to Nazi Germany. Every time the public and our public servants call for more responsible behavior, the industry refuses to have a meaningful dialogue or offer real solutions. Rather than working with you to address the negative impact the products have on children, they turn the conversation into a lecture on broadcast standards and the Constitution. Rather than acknowledging the scientific evidence manifested in over 1,000 medical and clinical studies, they underwrite their own research and then point to its lone and differing conclusion. And, rather than focusing on their statutory public-interest requirements for using the public airwaves, they shift the conversation to entertainment in general, and invoke the always sobering term, “chilling effect.”

Senator ROCKEFELLER. Mr. Winter, I don’t want to interrupt you, but I failed to explain, at the beginning, that there is a 5-minute rule for testimony, so that what you have to do is keep your eye on that little machine at the center to see which color it is. I see red. So, if you could finish in one sentence, it would be good.

Mr. WINTER. In one sentence?

In closing, Senator—

[Laughter.]

Mr. WINTER.—if I may offer a quote, sir—“Today, we are needing to be as responsible as we can possibly be, not just thinking of our own children, but our friends’ and neighbors’ children.” This was spoken by Steven Spielberg. He understands the difference between the type of violence we’re seeing here today, Senator, and entertainment where violence has been part of it for thousands of years, as part of storytelling.

I thank you. I’ll look forward to working with you, Senator, to find meaningful solutions here today.

[The prepared statement of Mr. Winter follows:]

PREPARED STATEMENT OF TIMOTHY F. WINTER, PRESIDENT,
PARENTS TELEVISION COUNCIL

Good day Mr. Chairman, Mr. Vice Chairman and Senators. Thank you for inviting me to be here with you this morning to discuss this important subject. And may I begin Mr. Chairman and Mr. Vice Chairman, by saying what a personal honor it is for me to appear before this Committee, on whose staff I had the pleasure to serve under your good friend and former colleague, Warren Magnuson.

My name is Tim Winter and I am President of the Parents Television Council. With almost 1.2 million members across the United States, the PTC is a non-partisan, non-profit, grassroots organization dedicated to protecting children and families from graphic sex, violence and profanity in entertainment.

Many in the Congress know of the PTC mostly as a vocal advocacy group, but the lion's share of our effort goes into research and education. The PTC staff monitors every hour of primetime broadcast entertainment programming and a growing amount of original programming on basic cable. PTC media analysts enter into a powerful computer database every instance of sex, violence, profanity, disrespect for authority, and other program content that parents might find harmful to their children; and we make that information available free of charge on our website so that parents and families can make more informed media choices.

So in the course of our work, Mr. Chairman, we at the PTC see pretty much everything. And when it comes to violence on television, the trend of what we are seeing today is not only concerning, it is frightening. In fact none of us would even be here today but for a level of media violence that approaches epidemic proportions.

This past January the PTC released *Dying to Entertain*—our latest Special Report analyzing the volume and degree of violence on primetime television. The television season which concluded last year was the most violent that the PTC has ever recorded—averaging 4.41 instances of violence per hour during prime time, or one instance every 13½ minutes—an increase of 75 percent since the 1998 television season. Over the course of a year, that means many thousands of violent depictions are broadcast over the public airwaves at times when millions of children are in the audience.

Between 1998 and 2006, violence increased in every time slot, including the so-called Family Hour of 8 p.m. Eastern, 7 p.m. Central Time. Last year nearly half (49 percent) of all episodes which aired during the study period contained at least one instance of violence. 56 percent was person-on-person violence. And 54 percent of violent scenes contained either a depiction of death or an implied death.

In addition to the marked increase in the quantity of violence, we are seeing several other disturbing trends. First, the depictions of violence have become far more graphic and more realistic than ever before, thanks in part to enhanced computer graphics and special effects employed in television production today. Second, there is an alarming trend for violent scenes to include a sexual element. Rapists, sexual predators and fetishists appear with increasing frequency on prime time programs. Third, we are now seeing the protagonist—the person the audience is supposed to identify with—as the perpetrator of the most violent acts. And lastly we are seeing more children being depicted as the victims of violence.

Mr. Chairman, violence has played an important role in dramatic story-telling for thousands of years. But the state of television violence is nothing like it has ever been before. As former FCC Chairman Newt Minow recently noted, “forty years ago I said television was a vast wasteland; now it is a toxic dump.”

Even TV critics who generally praise shows that “push the envelope” were aghast at how grisly the TV networks’ 2005–2006 season offerings were. *The Washington Post* suggested that the season was “dominated by a new brood of a relatively new breed: shows that are horrific on purpose, with gore as graphic and grisly as in many a monstrous movie.” *Rolling Stone* said “Welcome to prime-time-network and basic-cable television, where a bumper crop of bloodthirsty police procedurals and high-concept thrillers is making for perhaps the most violent, sadistic TV season ever.” The Associated Press said, “The body count in prime-time television these days rivals that of a war zone . . . [making] network TV home to an astonishing amount of blood ‘n’ guts.”

We as a nation have been talking about the problem of TV violence for a long time, and the industry has been providing excuses for the same duration. The House of Representatives held hearings more than 50 years ago to explore the impact of television violence and concluded that the “television broadcast industry was a perpetrator and deliverer of violence.” In 1972 the Surgeon General’s office conducted an overview of existing studies on television violence and concluded that it was a “contributing factor to increases in violent crime and antisocial behavior.” That was

in 1972. As I will now illustrate, the manner in which violence is depicted today has changed drastically since 1972.

We have prepared for your staff members a DVD with a sampling of scenes containing violence from recent television programs. Let me describe to you a few highlights or, more appropriately, a few low-lights:

During the May 22nd episode of *NCIS* that aired during the so-called “family hour” of 8 p.m. Eastern time (7 p.m. CT/MT), a drug smuggler dies when the packets in his stomach containing the drugs release deadly amounts into his system. The drug dealer, who was waiting for the delivery, and the smuggler’s sister, a desperate junkie, go to the hospital and attempt to retrieve the drugs from the smuggler’s body.

The scene shows the dead smuggler having his midsection sliced open and his blood-soaked organs pulled out of his body. The man’s digestive tract is sliced open and white powder spills over his bloodied torso. When a fight ensues, one character stabs the drug dealer with a scalpel and another character shoots the drug dealer. Then the junkie-sister is shown with her face buried in her brother’s bloody intestines as she snorts heroin off his dead body. This episode was rated TV-14, with no V content descriptor indicating violence.

On an episode of *C.S.I.*—which normally airs at 9 p.m. (8 p.m. Central and Mountain times) and is often repeated at 8 p.m. ET/PT—a young man is murdered inside a mental institution. Investigators discover that the killer was one of the nurses in the mental ward and mother to one of the inmates. It turns out that the woman had been having sex with her son for many years. The boy became a psychotic serial rapist and was institutionalized. The woman continued to send her son love letters while he was institutionalized and eventually took a job as a nurse at the institution so that she could continue to have sex with him. When she learned that her son was having sex with one of the male inmates, she killed her rival by smothering him with a pillow, then had her son cover up her crime by bashing the dead man’s head into the ground until it became a bloody, unrecognizable mess. Another inmate comes along, rubs his hands in the blood, and hungrily smears it all over his face as if he wants to devour it. The episode actually began with this horrific scene of brutality and gore—so any parent watching TV with their children who wasn’t fast enough changing the channel, would have been subjected to this disturbing content. Because this program airs before 10 p.m., as many as 2 million children are in the viewing audience on any given week, according to Nielsen.

A program called *The Shield* began on the advertiser-supported, expanded-basic cable network FX, and now the program airs on broadcast stations nationwide in syndication. This program has featured some of the most graphic violence and—in particular—graphic sexual violence ever seen on television—including premium subscription networks like HBO. In one episode, Vic Mackey—the series’ anti-hero, a corrupt cop—becomes enraged when he learns that Armadillo, a Mexican gang leader, burned one of his informants to death by “necklacing” him—placing tires around him so that he is immobilized, then dousing him with gasoline and setting him on fire. Vic brutally beats Armadillo, repeatedly kicking him and hitting him in the face with a heavy book as blood spatters on Vic’s shirt and face. Vic drags Armadillo into the kitchen and turns on an electric stove burner, then pushes Armadillo’s face into the red-hot coils of the burner. He pulls Armadillo’s head back so that TV audience can see the melting and charred flesh on his face. When Vic’s men finally pull him off, Armadillo’s mouth is filled with blood, and Vic’s face is covered with Armadillo’s blood.

In another episode of *The Shield*, Police Captain David Aceveda is forced at gunpoint to perform oral sex on a gang member. While holding the barrel of a gun to the policeman’s mouth, the gang member asks him, “You ever suck a dick like a cell bitch, cop man? Huh?” He threatens to kill the officer if he doesn’t perform fellatio, and the officer is seen and heard gagging and whimpering in humiliation. The gang member then gets one of his friends to take a picture of the scene as he climaxes into the policeman’s mouth. In the following season, Captain Aceveda repeatedly acted out violent rape fantasies with a prostitute.

These basic cable examples appeared on the FX basic cable network. Ryan Murphy, the creator of another FX series, *Nip/Tuck*, publicly stated that it might be his legacy to make possible a rear-entry sex scene on broadcast television. And Senators, if you subscribe to a cable or satellite service, you are forced to pay almost \$9.00 every year to the FX network so they can produce and air this kind of material. And with tens of millions of Americans forced into the industry’s bundling scheme, FX reaps hundreds of millions of dollars each year to produce this material, and that is before they sell even one TV commercial. FCC Chairman Martin has rightfully pointed out that “if a family must continue to pay for programming even when they object to it, there is little or no incentive for programmers to respond.”

This Committee has heard personally from cable distributors who would like to provide their customers with an opportunity to pick and choose—and pay for—only the networks they want. But they can't. As DISH Network CEO Charlie Ergen, and American Cable Association President Matt Polka have told you, the cable network media conglomerates won't allow it. So we must ask: are the cable industry's Washington insiders looking out for consumers and families, or are they protecting a business model that not only forces unwanted content into tens of millions of homes, but also makes them pay for it?

As troubling as those content examples are, Mr. Chairman, I am equally disgusted by the seeming contempt the industry has for anyone who would suggest reasonable self-restraint. Last month the CEO of Time Warner hypocritically warned parents: "visit the Holocaust museum in Washington and you'll see what happens when government gets control of the message." Yet no one is arguing that government should do any such thing. Are we to believe that the entertainment industry views the overwhelming concern of millions of parents and families with that level of disdain? If so, how can we believe anything they say about wanting to help parents protect children?

Every time the public—and our public servants—call for more responsible behavior, the industry refuses to have a meaningful dialog or offer real solutions. Rather than coming before you to address the negative impact their products have on children, they turn the conversation into a Constitutional lecture and hire a legendary scholar to speak for them. Rather than acknowledging the scientific evidence manifested in over a thousand medical and clinical studies, they underwrite their own research and point to its differing, but uncorroborated, conclusion. And rather than focusing on their statutory public interest requirements for using the public airwaves, they shift the conversation to entertainment in general and invoke the always-sobering term, "chilling effect." Many TV executives have used this term publicly to denounce the FCC's Janet Jackson ruling and the impact it's had on their business. But I wonder how "chilling" things really are if, as we've read in TV industry trade papers, the Fox broadcast network will be airing a program this fall where an amorous monkey joins a man and woman in a sexual encounter.

But I suppose the industry's behavior should come as no surprise. Look at their track record. After the Janet Jackson incident, television executives were quick to come before the Congress to pledge zero-tolerance for indecency. Shortly thereafter they filed a Federal lawsuit which would allow them to use the F-word at any time of the day, even in front of millions of children. And sadly they managed to find two judges in New York City who agreed to that preposterous abuse of the public airwaves.

In a slap in the face to the Congress and to millions of outraged families, CBS will be arguing in front of the Third Circuit in September that the Super Bowl strip-tease was not indecent. To add insult to injury, a few years ago CBS' parent company signed a Consent Decree with the FCC admitting to violating broadcast decency law, agreeing to pay a fine and submitting to a detailed compliance plan to insure that indecent material would not meet its air during the times when children are most likely to be in the audience. To this day, there is no hint that CBS has implemented the terms of this Consent Decree.

Through efforts like the "TV Boss" campaign, the industry promised you hundreds of millions of dollars to educate parents on content-blocking technologies, yet all objective data shows that parents still have no constructive grasp over the TV ratings system or the technologies that are reliant upon them.

And speaking of the rating system, let's talk about parental controls for a moment. When the V-Chip was introduced the television industry denounced it as censorial heresy. That is, they denounced it until they found a way to manipulate what was supposed to be a simple and transparent prophylactic device. Instead the industry turned the V-Chip into a means for even more graphic content while using it as an excuse to violate the broadcast decency law.

Our research into the television ratings system has repeatedly concluded that the industry's application of it is arbitrary, inconsistent, capricious and self-serving. In a study we released this past April, content ratings descriptors were either inaccurate or missing two-thirds of the time. During the study period, not one single program on primetime broadcast television was rated TV-MA, meaning that the networks felt all of their content was appropriate for children as young as 14.

Mr. Chairman, please understand that this is an industry that I love with every fiber of my being. I spent most of my career—more than 20 years—working in the media industry, the majority of which was in broadcasting and cable television. It is a wonderful business, capable of producing not only enlightening, educating and entertaining programming, but it is also a lucrative business with profit margins that most industries can only dream of. But with the ability to deliver a product

directly into every home in America comes a duty to serve the public interest. As Commissioner Copps stated in this very room, the term “public interest” appears no less than 112 times in the original law that addresses the use of the public airwaves. But by my count, the terms “Nielsen Ratings” or “advertiser cost per thousand” or “earnings per share” never once appeared. I have publicly stated a number of times that “public interest” and “corporate interest” are not mutually exclusive. Sometimes the two do not see eye-to-eye, and when they don’t, it is the public interest which must prevail. I ask you, Mr. Chairman, when does hurting children serve the public interest?

Nobody on Capitol Hill needs help from me in reading data from a national poll, but last week we all received information that needs to be carefully considered here today. The highly respected Kaiser Family Foundation released data proving just how concerned parents are about this matter. Even though the vast majority of parents say they are closely monitoring the media behavior of their children, parents are so concerned about the harmful content that still reaches their kids that 66 percent favor new regulation to limit the amount of sex and violence during the early evening hours. Let me say that again: two-thirds of parents favor *new* regulation. Clearly the *status quo* is not working.

Mr. Chairman, the entertainment industry could help if it wanted to, but it doesn’t want to. Producers should step back and reconsider their seeming urge for “one-upsmanship” in their depictions of ever-more-graphic violent content. Broadcasters could air graphic material later at night, when children are in bed. And the cable industry could allow its customers to select and pay for the cable networks they want to purchase.

The industry knows graphic and indecent material is inappropriate for certain audiences and at certain times. They embrace rules to prevent words and actions from being used in their workplace which could be sexually harassing. In fact the content samples above could constitute grounds for dismissal of a network employee if he/she acted in such a way to a coworker. And the industry regularly incorporates into employment agreements what is called a Morals Clause, allowing them to fire an employee or an artist for broadly-defined behavior. Yet they somehow justify delivering material like I’ve just described into living rooms around the country.

When it comes to behaving responsibly, sadly the industry is the model of inertia. Only when forced by the public through you is there every any positive movement undertaken by the industry.

Mr. Chairman, I know in my heart that the industry is capable of solving this issue if they truly wanted to. The people I worked with during my twenty-plus years in the industry are brilliant and creative. In fact the industry did implement solutions for decades in the past. But the question is: will they help to solve this issue today? If the National Rifle Association can help the Congress pass *consensus* gun control legislation, then I believe Hollywood can help the Congress deal with this issue. Moreover, it must.

Representing more than a million concerned families, we stand ready to work with you to forge real solutions to these problems. I hope the industry will step up and join us.

Thank you.

Senator ROCKEFELLER. Thank you very much, Mr. Winter.
Mr. Liguori?

**STATEMENT OF PETER LIGUORI, PRESIDENT,
ENTERTAINMENT, FOX BROADCASTING COMPANY**

Mr. LIGUORI. Thank you, Senator Rockefeller, Co-Chairman Stevens, members of the Senate Commerce Committee. I appreciate the opportunity to appear before you today. I ask that my full written testimony and attachments be submitted for the record.

Senator ROCKEFELLER. Will be done.

Mr. LIGUORI. I approach this issue from a professional, personal, and civic perspective. Professionally, as President of the FOX Broadcasting Company, I’m charged with putting on the air a diverse slate of entertainment programming. Personally, as a parent, I ensure that the shows watched by my 13-year-old daughter, Susannah, and my 15-year-old son, Jackson, are appropriate for

their age and maturity level. Finally, as a citizen, I'm deeply concerned about the problem of violence in our society. At the same time, I'm committed to the First Amendment right to free speech.

We, at FOX, take seriously our responsibility to inform viewers about our content. We have a large department of broadcast standards professionals whose job it is, is to ensure that our shows comply with the law and our own internal stringent standards. The department is involved at every step in the development, production, and broadcast of our entertainment programming. They meticulously review more than 500 hours of programming and tens of thousands of commercials per year. They're responsible for rating each episode of each show, providing both an age-based rating and content descriptors, where necessary. These ratings are shown at the start of every program on our air and after each commercial break. When appropriate, we also place an additional full-screen advisory at the start of the program to provide a warning to parents to pay close attention before they allow their kids to tune in.

On the poster in front of you, we have a visual depiction of what the ratings bug and advisories look like for "24." Note that the advisory is also provided through a voice-over—in this case, by the star of "24," Keifer Sutherland.

We also air public-service announcements as part of an industry-wide media campaign, spearheaded by the late Jack Valenti, that urges parents to take charge of their children's TV viewing.

Again, the posters in front of you are pictures of one of the PSAs and a print ad. The PSAs run during prime time in some of our most popular shows, including "American Idol." This PSA campaign refers parents to a website, *thetvboss.org*, where we provide detailed information about parental controls and the TV rating system.

We take all these steps to help parents make informed decisions. As we speak, the industry is looking at ways to improve the consistency of the TV rating system. Monthly, we, at FOX, review our standards and practices to ensure that we are adjusting to an ever-changing media environment.

Beyond our civic duty, we do this because it's good business. Our goal is twofold: to draw viewers by providing shows that they want to see, and to keep them by giving them programming they expect to see. It does us no good to surprise parents with inappropriate content, because such surprises could negatively impact future FOX viewing.

Teamed with our efforts, parents have a host of technological and informational tools at their disposal, including the V-Chip, cable and satellite parental controls, and third-party rating tools. And, above all, let's not forget the most effective and widely used tool of all: parents' individual discretion. A TV Watch study released yesterday found that 73 percent of all parents monitor what their children watch. This number goes up to 87 percent for those parents who have children under the age of 11. As we will hear from Professor Tribe, given the inherent difficulty of defining violence and drawing lines about what is appropriate, any attempt to regulate the depiction of violence could be found unconstitutional, and it would have a profound chilling effect on the creative community's

ability to produce authentic programming reflective of the world we live in.

Let me be clear, I share your concern about violence in our society. But there isn't an easy solution. The studies on the relationship between TV violence and violence in young people are clear. Three reports produced by our Government—namely, the Surgeon General, the FTC, and the FCC—have concluded there may be a connection between television and violence, but no causal link has been established. This distinction is critically important. Without a causal link, we cannot justify imposing content limits on our media. Should we, as parents, do more, nonetheless, to minimize our kids' exposure to TV violence? Absolutely. But this is the job of parents, not of the Government.

In closing, parents have the information, the tools, and, above all, the responsibility to decide which television shows are right for themselves and their children. We believe we should keep it that way.

Thank you.

[The prepared statement of Mr. Liguori follows:]

PREPARED STATEMENT OF PETER LIGUORI, PRESIDENT, ENTERTAINMENT,
FOX BROADCASTING COMPANY

Chairman Inouye, Co-Chairman Stevens, Members of the Senate Commerce Committee, I appreciate the opportunity to appear before you today to talk about the issue of television violence. I ask that my full written testimony and attachments be submitted for the record.

I approach this issue from a professional, personal and civic perspective. Professionally, as President of Entertainment of Fox Broadcasting, I am charged with putting on the air a diverse slate of programming.

Personally, as a parent, I ensure that the shows watched by my 13-year old daughter, Susannah, and 15-year old son, Jackson, are appropriate for their age and their maturity level.

Finally, as a citizen, I am deeply concerned about the problem of violence in our society. At the same time, I am committed to the First Amendment right to free speech.

We at Fox take seriously our responsibility to inform viewers about our content. We have a large department of Broadcast Standards professionals whose job it is to ensure that our shows comply with the law and our own stringent internal standards. These Standards professionals are involved at every step in the development, production and broadcast of our entertainment programming. They meticulously review more than 500 hours of programming and tens of thousands of commercials a year. They are also responsible for rating each episode of every show, providing both an age-based rating (such as TV-PG or TV-14) and content descriptors where necessary ("S" for sexual content, "L" for language, or "V" for violence).

These ratings are shown at the start of every program on our air, and after each commercial break. When appropriate, we also place an additional, full screen advisory at the start of the program to provide a warning to parents to pay close attention before they allow their kids to tune in. On the poster in the front of the hearing room, we have a visual depiction of what the ratings bug and advisories look like for Fox's 24. Note that the advisory is also provided through a voiceover, in this case by the star of 24, Kiefer Sutherland.

We also air public service announcements as part of an industrywide media campaign that urges parents to take charge of their children's TV viewing. In the posters in front of you are pictures of one of the PSAs and a print ad. The PSAs run during prime time in some of our most popular shows, like *American Idol*. This PSA campaign refers parents to a website—*thetvboss.org*—where we provide detailed information about parental controls and the TV rating system.

We take all these steps to help parents make informed viewing decisions. And we are always striving to improve our safeguards. As we speak, the industry is looking at ways to improve the consistency of the TV ratings system. Monthly, we at Fox review our Standards & Practices systems to ensure that we are adjusting to an ever-changing media environment.

Beyond our civic duty, we do this because it's good business. Our goal is twofold: to draw viewers by providing shows they want to see and keep them by giving them programming they expect to see. It does us no good to surprise parents with inappropriate content because such surprises could impact future Fox viewing.

Teamed with our efforts, parents have a host of technical and informational tools at their disposal, including the V-Chip, cable and satellite parental controls and third-party rating tools. And, above all, let's not forget the most effective and widely-used tool: parents' individual discretion. (*See Attachment 1.*)

The Kaiser Family Foundation last week released a survey which found that two-thirds of parents monitor their children's media use. Clearly, monitoring is as natural and simple as other daily parental tasks such as telling kids to look both ways before crossing the street, encouraging them to wear sunscreen, or telling them to eat their vegetables.

Given the inherent difficulty of defining violence and drawing lines about what is appropriate, any attempt to regulate the depiction of violence seemingly would be found unconstitutional. And it would have a profound chilling effect on the creative community's ability to produce authentic programming reflective of the world we live in.

Let me be clear: I share your concern about violence in our society. But there isn't an easy solution. The studies on the relationship between TV violence and violence in young people are clear. Three reports produced by our government—the Surgeon General, the FTC, and the FCC—have concluded that, while there may be a CONNECTION between television and violence, there is no CAUSAL link. This distinction is critically important. Without a causal link, we cannot justify imposing content limits on the media. (*See Attachments 2 and 3.*)

Should we as parents, nonetheless, do our jobs to minimize our kids' exposure to violent television? ABSOLUTELY. But this is the job of parents, not the government.

In closing, parents have the information, the tools and, above all, the responsibility to decide which television shows are right for themselves and their children. We believe we should keep it that way. (*See Attachment 4.*)

Attachments* to Written Testimony:

1.—Adam Thierer, Progress and Freedom Foundation, “The Right Way to Regulate Violent TV” (2007).

2.—Professor Jonathan Freedman, “Television Violence and Aggression: Setting the Record Straight” (2007).

3.—Professor Jonathan Freedman, “Inquiry on the Effects of Televised Violence: What Does the Scientific Research Show?” (2004).

4.—“From Kalamazoo to Chicago, Americans voice their opinion: Keep the FCC Away from My TV!” Top Editorials from around the Nation.

Senator ROCKEFELLER. Thank you.
Dr. Kunkel?

**STATEMENT OF DALE KUNKEL, PH.D., PROFESSOR,
DEPARTMENT OF COMMUNICATION, UNIVERSITY OF ARIZONA**

Dr. KUNKEL. Good morning.

I've studied children and media issues for over 20 years, and I'm one of several researchers who led the National Television Violence Study, a project widely recognized as one of the largest scientific studies of media violence. In my remarks here today, I'm going to briefly report some key findings from that project, and also try to summarize the state of knowledge in the scientific community about the effects of media violence on children.

You all know concern about the effects of harmful violence on television dates back to the 1950s, and the legitimacy of that concern has been corroborated by extensive scientific research that's accumulated over the past 40 years. Indeed, in reviewing the totality of empirical evidence regarding the impact of media violence, the

* All attachments are retained in Committee files.

conclusion that exposure to violent portrayals poses a risk of harmful psychological effects on children has been reached by the United States Surgeon General, the National Institute of Mental Health, the National Academy of Sciences, the American Medical Association, the American Psychological Association, the American Academy of Pediatrics, and a host of other scientific and public health agencies and organizations.

These harmful effects are grouped into three primary categories. First, and most importantly, children learn aggressive attitudes and behaviors from watching TV violence. Second, they become desensitized, or have an increased callousness toward victims of violence in society. And, third, they also develop an exaggerated fear of being victimized by violence.

While all of these effects are adverse outcomes, it is the first—an increased propensity for violence later in life—that is at the core of public health concern about children’s exposure to televised violence.

I should interject here that there are many different types of concerns that apply to this topic area—moral and ethical. The points I want to emphasize are public health concerns.

Violence in our society is a public health issue. The statistical relationship between children’s exposure to violent portrayals and their subsequent aggressive behavior has been shown to be stronger than the relationship between asbestos exposure and the risk of laryngeal cancer, the relationship between condom use and the risk of contracting HIV, and exposure to secondhand smoke in the workplace and the risk of lung cancer. There is no controversy in the medical public-health or social-science communities about the risks of harmful effects from children’s exposure to TV violence; rather, there is strong consensus that such exposure is a significant public health concern.

Now, besides studying the effects of TV violence, research has also examined the nature and extent of violence on television, and this body of evidence affords several conclusions across studies.

First, violence is widespread across the television landscape. Turn on a television set and pick a channel at random. The odds are better than 50/50 that the program you encounter will contain violent material. Sixty percent of approximately 10,000 programs that were sampled for the National Television Violence Study contained violent material. That study identified an average of 6,000 violent interactions in a single week of programming across 23 channels that we studied, including both broadcast and cable networks. More than half of the violent shows contained lethal acts, and roughly one in four included violence depicting the use of a gun.

A second content-based conclusion: Most violence on television is presented in a manner that actually enhances its risk of harmful effects on child viewers. More specifically, most violence on television follows a highly formulaic pattern that is both sanitized and glamorized. By “sanitized,” I mean portrayals that fail to show realistic harms to victims, both from a short- and long-term perspective. And by “glamorized,” I mean violence that is performed by attractive role models who are often justified for acting aggressively and who suffer no remorse, criticism, or penalty for their violent

behavior. And it's quite unfortunate that these types of portrayals enhance the risk of harmful effects.

In sum, it's clear that the level of violence on television poses cause for concern. The question is, what does all this mean for public policymakers? While exposure to media violence is not necessarily the most potent factor contributing to violence in society, it is certainly the most pervasive. Millions of children spend an average of 20 hours or more per week watching TV, and this cumulative exposure to violent images shapes young minds in unhealthy ways. Given the free speech guarantees of the First Amendment, the courts have ruled that there must be evidence of a compelling governmental interest in order for Congress to take action that in any way would regulate television. In my view, the empirical evidence documenting the risk of harmful effects from children's exposure to TV violence clearly meets this threshold. And I think it's important to underscore that former Attorney General Janet Reno offered an identical opinion to this very Committee when she testified before it in the 1990s.

To conclude, the scientific evidence about the effects of TV violence on children cannot clarify which path is best for policymakers to pursue in addressing this concern. That decision rests with your value judgments based upon the relative importance that each of you place on the protection of children, as compared to other competing factors, such as protecting free speech. But, when you make that judgment, as each member on this Committee is ultimately going to be asked to do, it is critical that you understand that TV violence harms large numbers of children in this country and significantly increases violence in our society.

[The prepared statement of Dr. Kunkel follows:]

PREPARED STATEMENT OF DALE KUNKEL, PH.D., PROFESSOR, DEPARTMENT OF
COMMUNICATION, UNIVERSITY OF ARIZONA

I have studied children and media issues for over 20 years, and am one of several researchers who led the National Television Violence Study (NTVS) in the 1990s, a project widely recognized as the largest scientific study of media violence. In my remarks here today, I will briefly report some key findings from the NTVS project, as well as summarize the state of knowledge in the scientific community about the effects of media violence on children.

The Effects of Television Violence

Concern on the part of the public and Congress about the harmful influence of media violence on children dates back to the 1950s and 1960s, and remains strong today. The legitimacy of that concern is corroborated by extensive scientific research that has accumulated over the past 40 years. Indeed, in reviewing the totality of empirical evidence regarding the impact of media violence, the conclusion that exposure to violent portrayals poses a risk of harmful effects on children has been reached by the U.S. Surgeon General, the National Institute of Mental Health, the National Academy of Sciences, the American Medical Association, the American Psychological Association, the American Academy of Pediatrics, and a host of other scientific and public health agencies and organizations.

These harmful effects are grouped into three primary categories: (1) children's learning of aggressive attitudes and behaviors; (2) desensitization, or an increased callousness toward victims of violence; and (3) increased or exaggerated fear of being victimized by violence. While all of these effects reflect adverse outcomes, it is the first—an increased propensity for violent behavior—that is at the core of public health concern about televised violence. The statistical relationship between children's exposure to violent portrayals and their subsequent aggressive behavior has been shown to be stronger than the relationship between asbestos exposure and the risk of laryngeal cancer; the relationship between condom use and the risk of contracting HIV; and exposure to second-hand smoke in the workplace and the risk of

lung cancer. There is no controversy in the medical, public health, and social science communities about the risk of harmful effects from children's exposure to media violence. Rather, there is strong consensus that exposure to media violence is a significant public health concern.

Key Conclusions about the Portrayal of Violence on Television

Drawing upon evidence from the National Television Violence Study, as well as other related research, there are several evidence-based conclusions that can be drawn regarding the presentation of violence on television.

1. Violence is widespread across the television landscape.

Turn on a television set and pick a channel at random; the odds are better than 50/50 that the program you encounter will contain violent material. To be more precise, 60 percent of approximately 10,000 programs sampled for the National Television Violence Study contained violent material. That study identified an average of 6,000 violent interactions in a single week of programming across the 23 channels that were examined, including both broadcast and cable networks. More than half of the violent shows (53 percent) contained lethal acts, and one in four of the programs with violence (25 percent) depicted the use of a gun.

2. Most violence on television is presented in a manner that increases its risk of harmful effects on child-viewers.

More specifically, most violence on television follows a highly formulaic pattern that is both sanitized and glamorized.

By sanitized, I mean that portrayals fail to show realistic harm to victims, both from a short and long-term perspective. Immediate pain and suffering by victims of violence is included in less than half of all scenes of violence. More than a third of violent interactions depict unrealistically mild harm to victims, grossly understating the severity of injury that would occur from such actions in the real world. In sum, most depictions sanitize violence by making it appear to be much less painful and less harmful than it really is.

By glamorized, I mean that violence is performed by attractive role models who are often justified for acting aggressively and who suffer no remorse, criticism, or penalty for their violent behavior. More than a third of all violence is committed by attractive characters, and more than two-thirds of the violence they commit occurs without any signs of punishment.

Violence that is presented as sanitized or glamorized poses a much greater risk of adverse effects on children than violence that is presented with negative outcomes such as pain and suffering for its victims or negative consequences for its perpetrators.

3. The overall presentation of violence on television has remained remarkably stable over time.

The National Television Violence Study examined programming for 3 years in the 1990s and found a tremendous degree of consistency in the pattern of violent portrayals throughout the television landscape. Across the entire study of roughly 10,000 programs, the content measures which examined the nature and extent of violence varied no more than a percent or two from year to year. Similar studies that have been conducted since that time have produced quite comparable results.

This consistency clearly implies that the portrayal of violence on television is highly stable and formulaic—and unfortunately, this formula of presenting violence as glamorized and sanitized is one that enhances its risk of harmful effects for the child audience.

In sum, the evidence clearly establishes that the level of violence on television poses substantial cause for concern. It demonstrates that violence is a central aspect of television programming that enjoys remarkable consistency and stability over time.

Implications for Public Policy

It is well established by a compelling body of scientific evidence that television violence poses a risk of harmful effects for child-viewers. While exposure to media violence is not necessarily the most potent factor contributing to real world violence and aggression in the United States today, it is certainly the most pervasive. Millions of children spend an average of 20 or more hours per week watching television, and this cumulative exposure to violent images can shape young minds in unhealthy ways.

Given the free speech guarantees of the First Amendment, the courts have ruled that there must be evidence of a "compelling governmental interest" in order for Congress to take action that would regulate television content in any way, such as

the indecency regulations enforced by the FCC. In my view, the empirical evidence documenting the risk of harmful effects from children's exposure to televised violence clearly meets this threshold, and I should note that former Attorney General Janet Reno offered an identical opinion to this Committee when she testified before it on this same issue in the 1990s.

There has been a lot of talk in recent weeks about the U.S. Court of Appeals (2nd Circuit) ruling regarding "fleeting expletives" that were cited as indecent by the FCC (*Fox et al., v. FCC*, June 4, 2007). Some have suggested this ruling threatens the future of any content-based television regulation. While I am not a legal expert, let me draw several important distinctions between this indecency case and the situation policy-makers face with the issue of television violence. First, there is no clear foundation of empirical evidence to document the effects of children's exposure to indecent material in any quantity, much less modest and fleeting examples of it. In contrast, there is an elaborate, solid foundation of evidence regarding the cumulative effects of televised violence on children. While "fleeting expletives" occur occasionally on television, they are generally quite rare. In contrast, violent portrayals are not only common, they are pervasive across the television landscape, and are found in a majority of programs.

Indeed, it is the cumulative nature of children's exposure to thousands and thousands of violent images over time that constitutes the risk of harmful effects. Just as medical researchers cannot quantify the effect of smoking one cigarette, media violence researchers cannot specify the effect of watching just a single violent program. But as exposure accrues over time, year in and year out, a child who is a heavy viewer of media violence is significantly more likely to behave aggressively. This relationship is the same as that faced by the smoker who lights up hour after hour, day after day, over a number of years, increasing their risk of cancer with every puff.

The scientific evidence about the effects of televised violence on children cannot clarify which path is the best for policymakers to pursue to address the problems that research in this area has identified. That decision rests more in value judgments, based upon the relative importance that each of you place on protecting children's health as contrasted with the other competing interests involved, such as freedom of speech concerns. But when you make that judgment—as each Member of this committee will eventually be called upon to do—it is critical that you understand that television violence harms large numbers of children in this country, and significantly increases violence in our society.

To conclude, the research evidence in this area establishes clearly that the level of violence on television poses substantial cause for concern. Content analysis studies demonstrate that violence is a central aspect of television programming that enjoys remarkable consistency and stability over time. And effects research, including correlational, experimental, and longitudinal designs, converge to document the risk of harmful psychological effects on child-viewers. Collectively, these findings from the scientific community make clear that television violence is a troubling problem for our society. I applaud this Committee for considering the topic, and exploring potential policy options that may reduce or otherwise ameliorate the harmful effects of children's exposure to television violence.

Senator ROCKEFELLER. Thank you, sir.

Mr. Jeff McIntyre, the American Psychological Association.

**STATEMENT OF JEFF J. MCINTYRE, SENIOR LEGISLATIVE
AND FEDERAL AFFAIRS OFFICER, PUBLIC POLICY OFFICE,
AMERICAN PSYCHOLOGICAL ASSOCIATION**

Mr. MCINTYRE. Good morning. I'm Jeff McIntyre, and I'm honored to be here today to represent the American Psychological Association.

The APA is the largest organization representing psychology, and has over 148,000 members and affiliates working to advance psychology as a science, as a profession, and as a means of promoting health education and human welfare.

My policy experience related to children and the media includes serving as a negotiator for the development of the current television rating system, as an advisor to the Federal Communications

Commission's V-Chip Task Force, and as a current member of the Oversight Monitoring Board for the Television Rating System.

I also co-chair the Children's Media Policy Coalition, a national coalition of public-health, child advocacy, and education groups, which includes among them the American Academy of Pediatrics, Children Now, and the National PTA.

In the late 1990s, tragic acts of violence in our schools directed our Nation's attention to the serious problem of youth violence. School shootings in Paducah, Kentucky; Jonesboro, Arkansas; Edinboro, Pennsylvania; Springfield, Oregon; and Littleton, Colorado, and, more recently, in Blacksburg, Virginia, have brought about a national conversation of the origins of youth violence and what we, as parents, as psychologists, and as public policymakers, can do to prevent more incidents of violence.

Years of psychological research on violence prevention and child development has helped inform and continues to address this current need. While the foundations of acts of violence are complex and variable, certain risk factors have been established in the psychological literature. Among the factors that place youth at risk for committing an act of violence is exposure to violence. This includes, but is not limited to, acts of violence in the media. Foremost in the conclusions drawn on the basis of more than 30 years of research contributed by APA members, such as the U.S. Surgeon General's report in 1972, the National Institute of Mental Health's report in 1982, and, as Dr. Kunkel just referred to, the National Television Violence Study, shows that repeated exposure to violence in the mass media places children at risk for increases in aggression, desensitization to acts of violence, and unrealistic increases in fear of becoming a victim of violence.

This research has provided the foundation upon which representatives of the public health community, comprised of the American Psychological Association, the American Academy of Pediatrics, and the American Medical Association issued a landmark consensus statement in 2000 regarding the state of the science on the effects of media violence on children. Certain psychological facts are well established in this debate. As APA member Dr. Rowell Huesmann, of the University of Michigan, stated before this very Committee, just as every cigarette you smoke increases the chances that someday you will get cancer, every exposure to violence increases the chances that someday a child will behave more violently than he or she otherwise would.

Hundreds of studies have confirmed that exposing our children to a steady diet of violence makes them more violence prone. The psychological processes here are not mysterious. Children learn by observing others. Mass media and the advertising world provide a very attractive window for these observations. Excellent children's pro-social programming, such as *Sesame Street*, and pro-social marketing, such as that around helmets for skateboarding, are to be commended and supported. Psychological research shows that what is responsible for the effectiveness of good children's programming and pro-social marketing is that children learn from their media environment. If children can learn positive behaviors this way, they can learn harmful ones, as well.

As I mentioned before this Committee last year, the rating system merits attention in this discussion. There continues to be concern arising from the ambiguity and the implementation in the current television rating system. The rating system can be, and has been, undermined by the marketing efforts of the very groups responsible for its implementation and effectiveness; for instance, marketing adult rated programming to children. This displays a significant lack of accountability and should be considered when proposals for industry self-regulation are discussed. At the very least, the industry is failing to actively promote its rating system, except in response to possible government oversight.

Where the vast amount of scientific data and agreement in the public health community is, regarding children's health, is that exposure to violence in the media is a significant concern and risk factor for individual children's health.

There is also a growing body of research on the health impact of sexualized images, on young girls specifically. This was detailed in the recent APA Task Force *Report on the Sexualization of Girls*.

Now, in terms of the recent Circuit Court ruling, it's important to mention that there is very little scientific evidence that documents the effects of fleeting expletives on children. This is not to say it's not a concern, as many parents groups, such as Mr. Winter's groups, will point out; however, in these instances, if the intent of regulating speech is concerned with the exposure of children—and that's referencing the original *Pacifica* case—then that concern is about the harm that is done to children.

Now, if harm or risk to children is the concern, then we must establish a standard from which all children may benefit equally. That foundation should be a health-based standard, based on the decades of child psychology and research on child development.

We know exposure—

Senator ROCKEFELLER. Sir, your time is about up, so if you could conclude.

Mr. MCINTYRE. Yes, sir. I'll conclude by saying thank you for having me.

[Laughter.]

[The prepared statement of Mr. McIntyre follows:]

PREPARED STATEMENT OF JEFF J. MCINTYRE, SENIOR LEGISLATIVE AND FEDERAL AFFAIRS OFFICER, PUBLIC POLICY OFFICE, AMERICAN PSYCHOLOGICAL ASSOCIATION

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psychologists, and public policymakers—can do to prevent more incidents of violence.

Years of psychological research on violence prevention and child development has helped inform, and continue to address, this urgent need. While the foundations of acts of violence are complex and variable, certain risk factors have been established in the psychological literature. Among the factors that place youth at risk for committing an act of violence are exposure to acts of violence. This includes, but is not limited to, those in the media.

Foremost, the conclusions drawn on the basis of more than 30 years of research contributed by APA members—as highlighted in the U.S. Surgeon General’s report in 1972, the National Institute of Mental Health’s report in 1982, and the three-year National Television Violence Study in the 1990s—shows that repeated exposure to violence in the mass media places children at risk for:

- increases in aggression;
- desensitization to acts of violence;
- and unrealistic increases in fear of becoming a victim of violence, which results in the development of other negative characteristics, such as mistrust of others.

This research provided the foundation upon which representatives of the public health community—comprised of the American Psychological Association, the American Academy of Pediatrics, and the American Medical Association—issued a landmark consensus statement in 2000 regarding the state-of-the-science on the effects of media violence on children.

Certain psychological facts are well established in this debate. As APA member Dr. Rowell Huesmann of the University of Michigan stated before the Senate Commerce Committee—just as every cigarette you smoke increases the chances that, someday, you will get cancer, every exposure to violence increases the chances that, some day, a child will behave more violently than he or she otherwise would.

Hundreds of studies have confirmed that exposing our children to a steady diet of violence makes them more violence prone. The psychological processes here are not mysterious. Children learn by observing others. Mass media and the advertising world provide a very attractive window for these observations.

Excellent children’s pro-social programming (such as *Sesame Street*) and pro-social marketing (such as that around helmets for skateboarding) are to be commended and supported. Psychological research shows that what is responsible for the effectiveness of good children’s programming and pro-social marketing is that children learn from their media environment. If children can learn positive behaviors this way, they can learn harmful ones as well.

As I mentioned before this committee last year, the ratings system merits attention in this discussion. There continues to be concern arising from the ambiguity in the implementation of the current ratings system. The ratings system can be undermined by the marketing efforts of the very groups responsible for its implementation and effectiveness (*e.g.*, marketing adult-rated programs to children). This displays a significant lack of accountability and should be considered when proposals for industry self-regulation are discussed. At the very least, the industry is failing to actively promote its rating system, except in response to possible government oversight.

Where the vast amount of scientific data and agreement in the public health community is—regarding children’s health—is that exposure to violence in the media is a significant concern and risk factor for individual children’s health. There is also a growing body of research on the health impact of sexualized images—on young girls specifically—as detailed in the recent APA Task Force *Report on the Sexualization of Girls*.

In terms of the recent Circuit court ruling, it’s important to mention that there is very little scientific evidence that documents the effects of “fleeting expletives” on children. This is not to say that it is not a concern—as many parents groups will point out. However, in these instances, if the intent of regulating speech is concerned with the exposure of children—to reference the original *Pacifica* case—then that concern is about the harm that is done to children.

If harm or risk to children is the concern, then we must establish a standard upon which all children may benefit equally. That foundation should be a health based standard, based on decades of child psychology and research on child development.

We know exposure to violence is a risk factor for committing later acts of violence. The more a child is exposed to violence—in the schools, in the family, in the media—the more prone they are to committing acts of violence later in life.

In conclusion, a detailed, content-based ratings system is a vital step toward giving parents the information they need to make choices about their children’s media

habits. Decades of psychological research bear witness to the potential harmful effects for our children and our Nation if these practices continue.

Chairman Inouye and distinguished members of the Committee, thank you for inviting me to present this testimony today. Please regard me and the American Psychological Association as a resource to the Committee in your deliberations on this important matter.

Senator ROCKEFELLER. Mr. Tribe, you'll forgive me for this, I hope—you probably won't, but it needs to be said, because you're such a national figure, associated more with the Supreme Court than with testifying here—but it should be known by my colleagues that you come here as a consultant for cable, networks and movies.

**STATEMENT OF LAURENCE H. TRIBE, CARL M. LOEB
UNIVERSITY PROFESSOR, HARVARD UNIVERSITY, PROFESSOR
OF CONSTITUTIONAL LAW, HARVARD LAW SCHOOL;
ON BEHALF OF THE AD HOC MEDIA COALITION**

Mr. TRIBE. Thank you, Mr. Chairman. I'm trying to turn the microphone on. Is it on?

Senator ROCKEFELLER. Yes, it is.

Mr. TRIBE. I'm honored to be here, Mr. Chairman. I am here as a consultant, but I've made it clear in a footnote to my testimony that I am saying what I believe and only what I believe even though in some instances it is not what those that I'm consulting for believe. I'm here, not representing Harvard, not representing any particular group, but stating my own views.

And I also want to stress that I'm here as a parent and a grandparent. I have only two grandchildren—I can't compete with some members on this Committee—but my most recent grandson was born 5 days ago.

I care enormously, as a parent, about what children are exposed to on TV. And, if I may be so permitted, I'm simply going to talk extemporaneously and ask that my prepared statement be submitted for the record, because I want to speak from deep feeling.

When Dr. Kunkel said—

Senator ROCKEFELLER. It is included.

Mr. TRIBE.—that the issue is one of protecting children versus protecting free speech, and that the question is about how we prioritize those two goals, I felt myself torn asunder. If I had to choose between my children and my grandchildren and the Constitution, I suppose I'd resign from the human race. But I don't think I have to choose, and I don't think this Committee has to choose either.

I think that, in the long run, it is not in the interest of my children, my grandchildren, or any of the children or grandchildren of this or any other generation to sacrifice free speech on the altar of protecting children. In the long run, it is not in the interest of our children that Big Brother decides what are suitable and what are unsuitable depictions of violence on television.

When I hear that much of the harm of violent depictions is a function of how sanitized or how glamorized the violence is, I hear the language of viewpoint discrimination. Yes, I recognize that it is more harmful for my kids to see the hero on a program be rewarded for violence. It might be helpful for them to see people who are evildoers get what's theirs. But I don't want President Bush or any President of this country, or any chairman of the FCC, to be

deciding what is too sanitized, what's too glamorous. We'll never be perfectly well off in this difficult terrain. But in the long run, I think that we are better off improving the tools that parents have.

Now, Mr. Chairman, you said, "Parents don't want more tools." I beg to differ. I think parents want and need more usable V-Chips. They also have tools they often don't know about, and a serious information campaign of the sort that Senator Lautenberg proposed might make a difference, as well.

The Supreme Court of the United States is realistic about this. In a number of decisions about "indecentcy," where it found that word an unacceptably vague standard, or about "patently offensive content," which it also found unacceptably vague, the Court recognized that simply empowering parents is not a perfect solution. But the Court further recognized that empowering parents is a less restrictive solution, and the burden is on government to make it more effective, not on government to simply turn over to Big Brother the keys to the television.

I very much agree with Vice Chairman Stevens when he says that we can't forget about the First Amendment here. And it's not simply because I like writing about the First Amendment or arguing about it or teaching my students about it. It's because I believe in it. I believe we are better off in a society that takes free speech seriously.

Now, with all respect, Mr. Chairman, when you showed what you did on what amounts to national television at 10 in the morning, I think you were making a judgment—a judgment I respect—about the best way to get this country moving on a subject you care passionately about. I share the passion, but I don't agree with the means.

It seems to me that the objections in the name of the First Amendment are not merely technical objections. When you said that—and I think I'm quoting you—"defining 'decency' is difficult," that was the understatement of the century. It's impossible for us to agree upon a definition of what is indecent for our kids to see. We can all look at the grotesque images that you showed on this screen and agree for ourselves we wouldn't want our children to see that. I wouldn't want to see it myself at 3 in the morning. But giving this power to government is not the solution.

When you hear testimony that there is better evidence about the harm of violence on television than there is about the harm of asbestos or the harm of smoking, I beg you to understand or remember what you all know: there is a difference between asbestos and speech, and there is a difference between nicotine and content. Even if you try to package a solution to this problem in economic language by making programming go à la carte, you'll have not only the unintended effects that Senator Smith talks about. (I believe that when he talks about children's programs that would be lost if we mandate à la carte, that's simply an example of the fact that there will be major impact on content.) Can you imagine telling a newspaper that it had to make its various sections available à la carte? Can you imagine telling musicians that they couldn't package records the way they wanted to? In the end, we're talking about content, and we're talking about viewpoint, and we're talking

about it in terms that, if we give the power to government, will be unconstitutionally vague.

We may feel better about having done something, finally, by passing a statute in this area, but it's not about feeling good when the courts come right back and strike it down; it's about making a difference. And to make a difference, you have to address what Senator Lautenberg referred to: the fundamental human appetite for this disgusting stuff. If we address this appetite through education and through information, we won't solve the problem perfectly, but we'll come closer than if we do violence to the First Amendment.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Tribe follows:]

PREPARED STATEMENT OF LAURENCE H. TRIBE,* CARL M. LOEB UNIVERSITY PROFESSOR, HARVARD UNIVERSITY, PROFESSOR OF CONSTITUTIONAL LAW, HARVARD LAW SCHOOL; ON BEHALF OF THE AD HOC MEDIA COALITION

Chairman Inouye, Vice Chairman Stevens, and distinguished members of the Committee: Thank you for inviting me to testify about the constitutionality of the legislative proposals made by the Federal Communications Commission (FCC) in its recent report on television violence.

That Report concludes that there is evidence—which the Report concedes to be mixed and uncertain—that certain depictions of violence on television correlate with harmful effects on children, including short-term aggressive behavior and feelings of distress, and that the existing V-Chip regime, based on the industry's voluntary ratings system, has been insufficiently effective at keeping violent content from children. On that basis, the Report recommends three legislative responses: time channeling, which would ban some content during certain hours; a mandatory, government-run ratings program to replace the current voluntary system; and mandatory unbundling, or à la carte cable/satellite programming, to require cable and satellite providers to give consumers a choice of opting in or out of channels or bundles of channels.

However, as Commissioner Adelstein forthrightly acknowledges in his separate statement, “the Report diminishes the extent to which courts have either expressed serious skepticism or invalidated efforts to regulate violent content.” FCC Report at 32. In my view, the First Amendment renders invalid and would be invoked by the Supreme Court to strike down legislation adopting any or all of the FCC's proposals. In raising these First Amendment concerns, I certainly do not mean to deny that parents have legitimate interests in what their children see on television. I am not only a father but a grandfather, and I believe that not everything on television is appropriate for young children to view—as the broadcasters and cablecasters acknowledge, both in their public statements and in their voluntary ratings.

I also do not mean to suggest that Congress is helpless to assist parents in this area. But the fundamental error of the FCC Report lies in its belief that the most appropriate response to concerns about television programs containing violent scenes or elements is more intrusive *governmental* control over the free flow of speech, rather than more narrowly tailored and far less restrictive alternatives to facilitate greater *parental* control. Such use of centralized government regulation is antithetical to the letter and spirit of the Constitution.

At the outset, I would like to emphasize that violent television programming is speech protected by the First Amendment—a point that the FCC Report concedes.

*Carl M. Loeb University Professor, Harvard University; Professor of Constitutional Law, Harvard Law School. My research and teaching focus primarily on the United States Constitution, including the First Amendment. I am the author of *American Constitutional Law*, which has been cited in more than 60 Supreme Court cases, and of numerous law review articles and books on constitutional analysis. I have also briefed and argued a number of cases before the Supreme Court on First Amendment issues, among others. In connection with this testimony, I have been retained—through the auspices of Akin Gump Strauss Hauer & Feld LLP, for which I serve as a consultant—by a coalition of affected media-related entities listed in the Appendix. However, the conclusions that I have reached, and that I express in this testimony, are my own and not those of Harvard Law School, Harvard University, or the individual members of the coalition. My conclusions are limited to the Federal constitutional validity of various proposed regulations.

At the most fundamental level, any attempt to regulate such protected speech will fail because it will be impossible to define “impermissible” depictions of violence on television according to the strict constitutional requirements that govern laws regulating speech. The first two FCC proposals rely on their face upon an explicit distinction between allowable and forbidden violent content. And even the third FCC proposal—mandatory unbundling—either expressly invokes or is concededly driven by concerns with the violent content that the first two proposals would overtly address. But such a distinction is necessarily ambiguous to the point of being unconstitutionally vague. To the extent that the First Amendment allows regulation of speech, it requires an extremely clear line between the permitted and the forbidden. In a great understatement, the FCC Report itself notes that drawing such a distinction in a constitutionally permissible manner would be “challenging,” FCC Report at 18, and so the FCC declines to try to come up with such a definition itself, leaving the task to Congress. But in my view, any attempt to come up with a constitutionally acceptable definition of “impermissible” television violence is more than challenging—it is hopeless. The adoption of a line as amorphous as would inevitably result from such an attempt would chill protected speech, as broadcasters, cable/satellite operators, and artists react in altogether predictable ways to uncertainty over whether they will face punishment—and, if so, how severely they would be penalized. Moreover, this vague prohibition would give regulators and prosecutors too much discretion to shape the content of free expression.

Any serious attempt to regulate violence on television would also be unconstitutional because the very effort on government’s part to regulate televised violence is an attempt by government to dictate the right way to think and feel about violence. But the First Amendment prohibits the government from forcing people to adopt a particular position on any subject of debate, whether the topic is global warming, immigration, or violence. And even if one believes that the First Amendment allows legislatures to limit the availability of violent content for the sake of young children—a conclusion that I believe is inconsistent with constitutional principle and Supreme Court precedent, which recognizes that children enjoy First Amendment protections as well—it is undeniable that the First Amendment fully protects the rights of adults and older children to view televised violence, and the concomitant rights of broadcasters, cable/satellite operators, and artists to formulate and express that content. Whatever Congress’s power to protect children, it cannot regulate speech in a way that infringes on these fundamental rights. What is more, any law regulating violence would fail to achieve the purposes that would motivate its enactment, and any such statute would be unconstitutional on those grounds alone.

The FCC Report suggests that none of these concerns applies because the government can regulate depictions of violence in the same way that it can regulate indecency, and others have suggested analogizing regulations of televised violence to obscenity laws. But depictions of violence cannot properly be equated or analogized to indecency or obscenity.

Finally, the FCC Report downplays and in some respects simply ignores a large and ever-growing number of less restrictive means by which parents can regulate the exposure of their young children to televised violence. Changes in technology have made it increasingly easy for parents who wish to do so to block content from their children, household by household, program by program, child by child. Indeed, technological advances allow parents to regulate television content in any fashion that they desire—beyond narrow concerns with violence, sex, or other substantively identified facets of the content to which their children are exposed. The First Amendment forbids more intrusive, centralized, one-size-fits-all regulations when such less restrictive, more individualized, and more narrowly tailored means are available.

TABLE OF CONTENTS

I. The First Amendment Protects Depictions of Violence On Such Media as Television.

II. The FCC’s Proposals Rely upon a Constitutionally Unacceptable Conception of “Impermissible” Depictions of Violence.

A. One cannot define a meaningfully distinguishable subcategory of objectionable television violence in a way that is not unconstitutionally vague.

B. Any plausible definition of impermissible television violence will unconstitutionally discriminate based on the viewpoint expressed.

C. Any plausible definition of impermissible television violence will be unconstitutionally overbroad.

D. Any plausible regulation of supposedly unacceptable television violence will contain too many internal inconsistencies to meet First Amendment standards.

III. Even Ignoring These Core Definitional Defects, the Fcc's Proposals Cannot Be Reconciled with the First Amendment.

A. Strict scrutiny applies to the FCC's specific proposals to regulate violent television programming.

1. Any analogy between "violence" and "indecentcy" or "obscenity" cannot support evaluating the FCC's proposals under anything less than strict scrutiny.

2. Strict scrutiny applies to regulations intended to protect minors.

3. Strict scrutiny applies to regulations of broadcast television content.

B. Under strict scrutiny, the FCC's proposals share a common flaw: they are not the least restrictive means to satisfy the government's interests.

1. Many less restrictive alternatives exist to respond to violent television programming.

2. These less restrictive alternatives embody the parent- and individual-centered structures for regulating speech that the Supreme Court has recognized as preferred by the First Amendment.

3. The FCC's criticisms of these alternatives do not save its proposals under the First Amendment.

C. All of the FCC's proposals accordingly violate the First Amendment.

1. Time Channeling.

2. Mandatory Ratings System.

3. Mandatory Unbundling.

a. First Amendment strict scrutiny applies to mandatory unbundling.

b. The First Amendment scrutiny of unbundling is unaffected by the involvement of money.

c. Unbundling's burdens on First Amendment rights cannot be justified.

IV. Appendix

I. The First Amendment Protects Depictions of Violence on Such Media as Television

The FCC Report concedes that the First Amendment protects depictions of violence, but the scope and rationale of this protection nevertheless deserve emphasis here. In *Winters v. New York*, 333 U.S. 507 (1948), the Supreme Court considered the constitutionality of a state law criminalizing the sale of magazines that displayed "stories of bloodshed, lust or crime." *Id.* at 511. New York argued that the First Amendment did not cover these magazines because they were merely entertainment and because they were "sanguinary or salacious publications." *Id.* at 510. The Court rejected these arguments, holding that "[w]hat 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." *Id.* The lower Federal courts have properly recognized that the rule announced in *Winters* applies to depictions of violence in other media as well. *See, e.g., Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 960 (8th Cir. 2003) ("*IDS*" applying First Amendment to violent video games); *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 579–80 (7th Cir. 2001) (applying First Amendment to violent video games); *Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63, 64 (2d Cir. 1997) (applying First Amendment to trading cards depicting violent crimes); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 691 (8th Cir. 1992) (applying First Amendment to videos depicting violence); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985) (noting that depictions of violence on television are covered by the First Amendment). Of course, "programs broadcast by . . . television . . . [also] fall within the First Amendment guarantee." *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981).

Thus, violent television content—whether it educates or merely entertains—is protected by the First Amendment. This conclusion properly recognizes that depictions of violence have always been an integral part of expressive speech. From Greek mythology to the stories in the Bible, from Grimm's Fairy Tales to innumerable great plays, novels, and movies, depictions of violence have long played a role in the stories, fables, and narratives that illustrate and inform our notions of crime and punishment, evil and justice, right and wrong. The use of violence in television

programming is no different. Depictions of violence and its effects and consequences can contribute powerfully to a show's portrayal of our often violent world or its equally violent history, and the use of violence—however disquieting—adds emphasis that is nearly impossible to achieve otherwise. For example, news programs reporting on a war could not be as truthful, nor achieve the same impact, if they shied away from violence, and a Holocaust documentary that unflinchingly portrays the atrocities of that era is both more honest and more effective than a documentary on the same subject that avoids any such video or pictorial depictions. These are contexts in which excising elements of violence would lie by omission.

The important role of depictions of violence holds for fictional programming as well. Many of our most popular and critically acclaimed television shows are indelibly associated with depictions of violence. “The Untouchables,” “Dragnet,” “Hawaii Five-O,” “Columbo,” “Rockford Files,” “Murder, She Wrote,” “Hill Street Blues,” “Law and Order,” “CSI”—these and scores of other police and detective series would be severely weakened, artistically and dramatically, if they could not depict with some degree of verisimilitude the commission and consequences of violent crimes and the physical conduct sometimes necessary on the part of law enforcement to bring wrongdoers to justice. Similarly, shows about espionage (*e.g.*, “I Spy,” “Mission Impossible,” “24”), war (*e.g.*, “Combat,” “Twelve O’Clock High”), science fiction and the supernatural (*e.g.*, “Star Trek,” “X-Files,” “Lost”), and doctors (*e.g.*, “MASH,” “ER,” “Grey’s Anatomy”) would be greatly diminished in their power and their storytelling if they could not contain some scenes of violence or its effects, as well as scenes showing surgical and other medical procedures.

My point here is not that violence is necessary for television programs to express any “message,” or that it is impossible for these shows or others to continue in *some* form without portraying violence. Rather, my point is that all of these programs and many others would be drastically different—and considerably less valuable as speech—if they were forbidden to portray physical violence and its consequences in the way that they do. Whether fictional or nonfictional, journalistic or artistic, depictions of violence in television programming are entitled to the powerful protection of the First Amendment.

II. The FCC’s Proposals Rely upon a Constitutionally Unacceptable Conception of “Impermissible” Depictions of Violence

The FCC Report does not, of course, recommend that *all* violence on television be regulated. Rather, it recommends regulating only those depictions of violence that the FCC views as somehow crossing the line from “permissibly violent” to “impermissibly violent.”

All of the FCC’s proposals necessarily rely, either on their face or in their justification, on this distinction between permissible and impermissible depictions of violence. Time channeling would segregate impermissibly violent television programming into late-night time slots, while allowing permissibly violent programming to be aired at all hours. A mandatory ratings system would impose one rating on shows with permissible violence and another, presumably more severe, rating on shows with impermissible violence. Many unbundling proposals require cable/satellite providers to separate channels with permissible violence from channels with impermissible violence. And even unbundling proposals that are drafted without any mention of violent content are transparently driven by the same concerns.

Although the distinction between permissible and impermissible views of violence thus lies at the heart of all of the FCC’s proposals, the Report provides little meaningful guidance on the content of this distinction or on how to translate it into operative language. The FCC’s silence is telling. It is not difficult to see why any attempt to distinguish between permissible and impermissible displays of violence—using words and concepts like “excessive,” “gratuitous,” and so on—could not pass muster under First Amendment scrutiny.

A. One cannot define a meaningfully distinguishable subcategory of objectionable television violence in a way that is not unconstitutionally vague.

The FCC Report proposes that Congress regulate “excessively violent programming that is harmful to children” on television. The heart of any such law will be its definition of “excessively violent,” but any meaningful definition of “excessive violence”—that is, any definition that prohibits a significant amount of the violent content that the FCC is concerned about—will be unacceptably vague because it will be impossible at the end of the day to tell what the definition regulates and what it does not. And the FCC Report—despite concluding that it would be “possible” to develop an “appropriate” definition—fails entirely to explain what that definition should be or why it would pass constitutional muster.

The Due Process Clause requires any law, whatever its context, to be specific about what it prohibits: “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Two principal concerns have driven this prohibition on vague laws, even when the First Amendment is not at stake. First, it is fundamentally unfair to punish a person for conduct he could not have known was prohibited: “Vague laws may trap the innocent by not providing fair warning.” *Grayned*, 408 U.S. at 108. Second, it is the lawmaker’s responsibility to decide what will be punished, but a vague law in effect “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis.” *Id.* 108–09.

Laws regulating speech are held to even “stricter standards” and must be particularly clear: “[A] man may the less be required to act at his peril” when a statute may have a “potentially inhibiting effect on speech,” because “the free dissemination of ideas may be the loser.” *Smith v. California*, 361 U.S. 147, 151 (1959); see also *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 288 (1961). It is a speaker’s right to speak freely when what he wants to say does not violate any law, but vague laws “inevitably lead citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked,” thus chilling constitutionally protected speech. *Grayned*, 408 U.S. at 109.

The prohibition on vagueness becomes no less stringent simply because “a particular regulation of expression . . . was adopted for the salutary purpose of protecting children,” as the Supreme Court held in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968). There, the Court invalidated a statute that permitted a movie review board to censor films that the board deemed “unsuitable” for consumption by children if, among other things, they described or portrayed “brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency.” The Court found the phrase “likely to incite” insufficiently determinate, in effect granting the board a “roving commission” to censor any films of which it disapproved. *Id.* at 688. For the same reason, the Second Circuit recently noted that the FCC’s efforts to protect children from “indecent” language, fleetingly uttered, was likely unconstitutional because the FCC’s vague definition of indecency “permits the FCC to sanction speech based on its subjective view of the merit of that speech” and thus gives “too much discretion to government officials.” *Fox Television Stations, Inc. v. FCC*, ___ F.3d ___, No. 06–1760, slip op. at 34 (2d Cir. June 4, 2007). Even though the statute in *Interstate Circuit* and the regulation in *Fox* both sought to protect children, the grants of censorship authority were void for vagueness under the same rule that would have applied had the statute sought only to protect adults.

Despite these settled principles, the FCC surmises that it would be possible to establish a definition of “excessive violence” that would somehow satisfy the Constitution. As a concrete example, the FCC suggests that Congress could prohibit “depictions of physical force against an animate being that, in context, are patently offensive.” FCC Report at 20. The FCC also notes—without explaining whether it believes they would be constitutional—several definitions of prohibited violence proposed by commentators, among them depictions of “outrageously offensive or outrageously disgusting violence”; of “severed or mutilated human bodies or body parts, in terms patently offensive as measured by contemporary community standards for the broadcast medium”; and of “intense, rough or injurious use of physical force or treatment either recklessly or with an apparent intent to harm.”

None of these proposed definitions is specific enough to give broadcasters, cable/satellite operators, or regulators any real sense of what is prohibited, much less the precise guidance that the Constitution demands. Phrases like “outrageously offensive,” “patently offensive,” “intense,” or “rough” are “classic terms of degree”—they measure a *quality* speech rather than delineating a firm and discrete *category* of speech. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1049–49 (1991). As a result, they do not offer sufficient guidance because a person of “ordinary intelligence” would have to guess at whether a particular program violates the rule. See *Grayned*, 408 U.S. at 108.

The impenetrable darkness into which such definitions would plunge writers, producers, broadcasters, cable/satellite operators, and other creators and distributors of content is easily illustrated by reference to a recent report on television violence by

a group that strongly backs government regulation of television violence.¹ Among the examples of television programming that the group deems objectionable, and which it presumably would want to subject to government regulation and fines:

- A little girl pulls another girl's hair on an episode of "America's Funniest Home Videos";
- A "dead and bloodied body" is shown on an autopsy table in an episode of "Medical Investigation";
- A witness describes an alleged rape (never shown) on "Law and Order";
- Two bloody murders are described, but not shown, and the bloody crime scene (without bodies) is depicted, on "Criminal Minds";
- On "CSI Miami," a man falls into the water and is surrounded by sharks. His actual death is not shown, but "[b]lood fills the water and one of the man's shoes is shown falling to the bottom of the ocean floor."

In any of these cases, how is a government regulator to decide whether the violence is "gratuitous," "excessive," and/or "patently offensive," as the group listing these examples evidently believes? Any such inquiry would be unavoidably, and almost entirely, subjective, leaving a creator or distributor of content no choice but to steer far clear of anything that might be deemed objectionable by the most sensitive viewer.

The same concerns have driven the Court to strike down other statutes for vagueness. In the most directly applicable case, *Winters v. New York*, the Court paid special attention to the way in which efforts to prevent regulations of violent materials from being fatally overbroad operated to render such regulations unacceptably vague. Thus, in striking down a prohibition on violent printed materials that were "so massed as to become vehicles for inciting violent and depraved crimes against the person," the Court in *Winters* noted that the novelty of this legislative phrase showed "the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications." 333 U.S. at 519.

Similarly, in *Reno v. ACLU*, 521 U.S. 844 (1997), the Supreme Court found impermissibly vague a Federal statute—the Communications Decency Act (CDA)—that banned the online distribution of "indecent" material that, "in context, depict[ed] or describ[ed], in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." 47 U.S.C. § 223(d)(1) (1994 ed., Supp. II). The Court concluded that this standard "lacks the precision that the First Amendment requires when a statute regulates the content of speech." 521 U.S. at 873. It found deeply troubling "the vagueness inherent in the open-ended term 'patently offensive';" such vagueness, the Court said, "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Id.*

The phrases suggested by the FCC to delimit a class of impermissibly violent content—"outrageously offensive," "rough," "intense," and the like—are no more definite than other statutory phrases deemed unconstitutionally vague by the Supreme Court, from "patently offensive" and "so massed as to become vehicles for inciting" in *Reno v. ACLU* and *Winters*, respectively, to such phrases as "moral and proper" and "prejudicial to the best interests of the people." *See Interstate Circuit*, 930 U.S. at 682 (listing impermissibly vague phrases). Because these phrases have no historically or legally established meaning, they provide little guidance for those subject to punitive measures for failing to comply with the statute's imprecise commands.

The vague definitions of impermissible violence proposed by the FCC also pose another danger: the delegation of essentially boundless, subjective discretion to the FCC. Language like "patently offensive," when divorced from the historical and legal contexts to which it has traditionally been attached, has such a "standardless sweep" that it would impermissibly allow the FCC's individual enforcement agents "to pursue their personal predilections." *Smith*, 415 U.S. at 575. Indeed, vague standards could empower the FCC to crack down on certain programs because of political pressure, or based on individual commissioners' aesthetic or moral judgments about particular shows or particular scenes. As with a statute prohibiting "opprobrious words or abusive language," such as the one the Supreme Court invalidated in *Gooding v. Wilson*, 405 U.S. 518 (1972), any attempt to regulate violence will be too "easily susceptible to improper application." *Id.* at 528; *see also Forsythe County v. Nationalist Movement*, 505 U.S. 123, 133 n. 10 (1992) ("It is not merely

¹Parents Television Council, *Dying to Entertain: Violence on Prime Time Broadcast Television 1998 to 2006* (January 2007), available at <http://www.parentstv.org/PTC/publications/reports/violencestudy/DyingtoEntertain.pdf>.

the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of expression.”).

The FCC’s conclusion that a definition of impermissible violence can avoid vagueness problems is unconvincing because it makes no real effort to grapple with the Supreme Court’s First Amendment vagueness precedents. Ignoring every other case, the Report does cite glancingly to a single Supreme Court opinion to suggest that a sufficiently clear definition of violence could be developed. That decision, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), does not support the FCC’s conclusion. In *Pacifica*, the Supreme Court upheld a sanction on a radio station for broadcasting “indecent” content despite an arguably vague definition of “indecent.” But the underpinnings of *Pacifica* have since been eroded, and, in any case, are not transferable to the context of television violence.

First, as the Supreme Court recognized at the time, 438 U.S. at 750, and has subsequently reaffirmed, *Pacifica* stands for “an emphatically narrow holding.” *Sable Communication, Inc. v. FCC*, 492 U.S. 115, 127 (1989). That holding was limited to its facts—a particular comic monologue, broadcast on the radio, which was pervaded by words with explicit sexual meanings. Indeed, the *Pacifica* Court had no occasion to consider—and did not consider—whether any particular definition of “indecent” was constitutional, because the respondent had conceded that the programming was “patently offensive.” 438 U.S. at 739; *id.* at 742 (declining to decide whether the Commission’s general definition of “indecent” was constitutional and stressing that its review was limited to the particular broadcast before it).

Second, the FCC Report ignores the Supreme Court’s much more recent decision in *Reno v. ACLU*, mentioned above, which found impermissibly vague the CDA’s ban on the distribution of “indecent” material on the Internet even though the CDA’s definition of prohibited material was essentially identical to the FCC’s broadcast indecency standard. Just this month, the U.S. Court of Appeals for the Second Circuit said that, in light of the *Reno v. ACLU* decision, “we are skeptical that the FCC’s identically worded indecency test could nevertheless provide the requisite clarity to withstand constitutional scrutiny.” *Fox, supra*, slip op. at 31. Indeed, the Second Circuit continued, “we are sympathetic to the . . . contention that the FCC’s indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague.” *Id.* at 32.

Finally, even if *Pacifica* would be read as allowing a particular use of a vague definition of “indecent,” its reasoning could not be extended to definitions of “excessive violence” that use the adjective “indecent” or that are modeled on existing definitions of “indecent.” Like obscenity law, indecency regulation is a constitutional anomaly with a distinct historical provenance that taps into traditional concerns with personal modesty and the propriety of open expressions of sexuality—concerns that find no analogue in depictions of violence. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (plurality opinion) (citing common law prohibitions on public indecency that predated the First Amendment by more than a century to uphold a prohibition on public nudity). The legal and historical distinctions between “indecent” and “violence” lay at the heart of the *Winters* Court’s recognition that the treatment of “indecent” material could not be invoked to sustain a similarly worded definition of impermissible violence, which the Court held “ha[d] no technical or common law meaning.” 333 U.S. at 518, 519.

The conclusion that any meaningful attempt to regulate violence on television would fail on vagueness grounds does not rest on mere conjecture about how the lower courts would apply the Supreme Court’s precedents. To the contrary, the lower Federal courts have consistently struck down prohibitions of displays of violence on vagueness grounds. When Louisiana attempted to regulate any video game that “appeal[ed] to the minor’s morbid interest in violence,” a Federal court held that the language the statute used was too vague because video game makers would be “forced to guess at the meaning and scope of the Statute.” *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 836 (M.D. La. 2006). In *Entertainment Software Association v. Blagojevich*, 404 F. Supp. 2d 1051, 1077 (N.D. Ill. 2005), *affirmed*, 469 F.3d 641 (8th Cir. 2006), a Federal district court struck down that state’s violent video game law on the ground that the statute’s definition of impermissible violence—such as depictions of humans inflicting “serious physical harm” on other humans—was too vague. *Id.* at 1077. Similar statutes have been struck down in Michigan (*Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006)), Washington (*Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004)), and Minnesota (*Entertainment Software Association v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006)), and have been enjoined in Oklahoma (*Entertainment Software Association v. Henry*, 2006 WL 2927884 (W.D. Oklahoma, 2006)), and California (*Video Software Dealers Association v. Schwarzenegger*, 401 F.Supp. 2d 1034 (N.D. Cal. 2005)).

B. Any plausible definition of impermissible television violence will unconstitutionally discriminate based on the viewpoint expressed.

Much of the drive to regulate televised violence responds less to violence as such than to what a particular depiction appears to say about the use of violence—whether it appears to glamorize or condemn such use, whether it seems to approve or disapprove of some form or degree of violent behavior in a given context, and what attitude about or perspective on violence viewers might be expected to take away from the experience. It is hardly a coincidence, therefore, that definitions of “impermissible” depictions of violence often reveal explicit viewpoint discrimination of a sort that flies in the face of core First Amendment precepts: for example, the FCC Report suggests that a definition of violence might helpfully include factors such as whether violence is “glamorize[d]” or “trivialize[d],” “whether [the violence] is morally defensible or unjustified,” and “whether the violence is explicitly rewarded or goes unpunished.” FCC Report at 20 & 8 n. 34 (citing factors identified in violence study).

But any law, regulation, or enforcement practice that explicitly or implicitly restricted “excessively violent” programming in this way, or in any way that considered the purpose or message behind the use of violence, would necessarily be subject to—and would almost certainly fail—the strictest First Amendment scrutiny, as landmark decisions such as *RAV. v. City of St. Paul*, 505 U.S. 377 (1992), make clear. At issue in that case was a local ordinance criminalizing “fighting words” that attacked the intended victim’s “race, color, creed, religion or gender.” *Id.* at 391. The Court acknowledged that “fighting words,” like obscenity (but *unlike* depictions of violence), generally receive the lowest level of First Amendment protection. It nevertheless concluded that this ordinance violated the First Amendment because it engaged in *unconstitutional viewpoint discrimination*: it prohibited racist, sexist, and anti-religious “fighting words,” but not similar speech “*in favor* of racial, color, etc., tolerance and equality.” *Id.* “The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed,” even if that speech as a general matter receives less First Amendment protection. *Id.* at 386; see also *Kingsley-International Pictures Corp. v. Regents of the University of the State of N.Y.*, 360 U.S. 684 (1959) (striking down state law proscribing the display of any film depicting adultery as desirable).

The same rationale would apply to prohibit any law defining “impermissibly violent” programming as programming that expressed or implied approval or tolerance of violence; that left audiences with the sense that violence could be engaged in without anyone getting badly hurt; or that instilled undue fear at the thought of being violently attacked. Presumably, under such a law, equally intense, graphic, and even vicious portrayals of violence would be permitted, so long as they expressed the view that violence was generally improper, typically injurious and painful to perpetrator and victim alike, but not so rampant as to be a reason for nightmarish fear. Similarly, neither a Federal statute nor an enforcement action by the FCC could constitutionally punish violence employed for a bad or evil purpose—as by a criminal—while leaving unpunished violence employed for a good or just purpose—as by a police officer or a superhero. To treat a scene showing a criminal shooting a fleeing victim in the leg differently from a scene depicting a policeman shooting a fleeing suspect in the leg would be to engage in precisely this kind of forbidden discrimination on the basis of viewpoint. And if a law drew a distinction between, for example, real violence during an actual boxing match (which it permitted), and fake violence during a simulated fight in a television show (which it forbade), it would also enforce a particular view about when violence is appropriate. Such discrimination among viewpoints triggers the strictest possible scrutiny, and under *RAV.* would almost certainly fail that test.

C. Any plausible definition of impermissible television violence will be unconstitutionally overbroad.

An intrinsic problem with defining impermissible violence is that any such definition that manages to sweep in *enough* violent content to accomplish Congress’s goals will at the same time sweep in far *more* speech than may permissibly be suppressed. Whatever interests Congress may assert to regulate televised violence, they do not justify prohibiting adults (or, for that matter, older children) from seeing the violent but protected depictions that the FCC hopes to prevent young children from seeing.

Even a statute enacted with the best of intentions, and even one undoubtedly effective in achieving its objectives, is “unconstitutional on its face if it prohibits a substantial amount of protected expression.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). “[W]hen legitimate legislative concerns are expressed in a stat-

ute which imposes a substantial burden on protected First Amendment activities,^[2] Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms. The Constitution and the basic position of First Amendment rights in our democratic fabric demand nothing less." *United States v. Robel*, 389 U.S. 258, 267 (1967).

It has long been settled that the First Amendment prohibits limiting permissible expression to speech that would be suitable for the very young. In the landmark case of *Butler v. Michigan*, 352 U.S. 380 (1957), the Supreme Court considered the constitutionality of a Michigan statute that criminalized distribution of books that contained language "tending to the corruption of the morals of youth." The State of Michigan argued that, "by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare." *Id.* at 383. The Court emphatically rejected this argument, famously observing: "Surely, this is to burn the house to roast the pig. . . . The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." *Id.*

Similarly, in *Ashcroft*, the Supreme Court struck down a statute that would have banned the display of "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, that 'is, or appears to be, of a minor engaging in sexually explicit conduct.'" 535 U.S. at 241. This statute was aimed at protecting minors, both from abuse in the making of such depictions and, like the regulations here contemplated by the FCC, from the effects that the dissemination of those depictions could have on them. The Court recognized that protecting children was vitally important, but observed that the statute prohibited vast quantities of speech that adults had a right to hear, such as several films that either won or were nominated for Academy Awards. The Court held that "[t]he Government cannot ban speech fit for adults simply because it may fall into the hands of children." *Id.* at 252; see also *Reno v. ACLU*, 521 U.S. at 877 (striking down the ban on indecent material on the Internet because "[t]he general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or other value"); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 79 (1983) (Rehnquist, J., concurring) (noting that ban on mailing contraception information, ostensibly to protect children, is "broader than is necessary because it completely bans from the mail unsolicited materials that are suitable for adults").

Many of the proposed regulations of television violence share the same constitutional defect: out of concern for protecting young children, they would prevent adults and older children from viewing programs that they are constitutionally entitled to see. Indeed, as noted above, some of the leading advocates for centralized regulation of television violence have raised objections to an astonishingly broad range of content—extending well beyond actual depictions of even arguably objectionable violence—that they believe should be kept off television (at least before 10 p.m.), including televised descriptions of violent behavior (such as the testimony of a victim at a rape trial), mere intimations that violence has occurred (such as blood on the floor), and even depictions of medical procedures.³ Whatever the merits of restricting the availability of such content to young children, no similar argument can possibly justify keeping this content away from adults and older children, as the FCC's proposals threaten to do.⁴ Congress may not prescribe a regulation of violent speech that limits "the level of discourse reaching [people's homes] . . . to that which would be suitable for a sandbox." *Bolger*, 463 U.S. at 74.

D. Any plausible regulation of supposedly unacceptable television violence will contain too many internal inconsistencies to meet First Amendment standards.

The FCC has identified several interests that are arguably served by centrally regulating televised violence, including:

- enabling parents to protect their children from material that the parents believe will make their children too insensitive to the evils of hurting others,
- enabling parents to protect their children from material that the parents believe will make their children too fearful of being violently injured or killed, and

²In that case, the burden was "bar[ring] employment . . . for association which may not be proscribed consistently with First Amendment rights." 389 U.S. at 266.

³See Parents Television Council, *Dying to Entertain*, *supra*.

⁴According to Nielsen, 84.2 percent of American television homes contain no children under six, 73.9 percent of American television homes contain no children under twelve, and 64.2 percent of American television homes contain no children under eighteen. Nielsen Television Index, 2007–2008 Universe Estimates.

- protecting children from material their parents would not want them to see but are unable to keep from their children despite that wish.

However legitimate or even compelling these interests might be, they are at war with one another to such a degree that they will ironically render any statute that was closely tailored to serve any one of those interests self-defeating with respect to others, leaving it unconstitutionally *ill-fitting* under the First Amendment. See *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994).

The ostensible interest in protecting children from frightening material, for example, would suggest that any depiction of violence should be cartoonish and sanitized, as in the madcap violence of the Roadrunner cartoons or the Three Stooges or the stylized heroics of the old Batman series; but this would undercut the asserted interests in making children understand the real-life consequences of violence and in avoiding material that proponents of regulation fear children might imitate. Further, if some obviously protected categories of violent depictions, such as those in news or sports, were exempted in order to save regulation of television violence from unimaginable overbreadth, the result would be to prevent Congress's goals from being meaningfully served: children who would imitate the physical brawling on a detective drama would be no less likely to imitate the hard-hitting tackles on televised football games, assuming the risk of imitative behavior to be as the proponents suggest it is. And if the fictional bloodletting on "The Shield" scares young children, then surely the very real violence that children might see while watching news about the war in Iraq would be no less frightening. The First Amendment forbids speech regulation that selectively targets some speech while exempting other speech that is likely to have similar effects. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487–89 (1995); *City of Cincinnati v. Discovery Networks, Inc.*, 507 U.S. 410, 427 (1993); *Edenfield v. Fane*, 507 U.S. 761, 773 (1993); *Fox*, *supra*, slip op. at 24 (noting that ability of children to hear fleeting expletives in contexts expressly permitted by the FCC such as news programs and a movie like "Saving Private Ryan" undermined the FCC's rationale that hearing such fleeting expletives was inherently damaging to children).

III. Even Ignoring These Core Definitional Defects, the FCC's Proposals Cannot Be Reconciled With the First Amendment

As a result of these characteristics, all of the options presented in the report clearly flunk even the "intermediate" scrutiny test that governs content-neutral regulations of speech.⁵ But the FCC's proposed regulations of television violence suffer from constitutional infirmities beyond the definitional flaws I have already described. Because each of the proposals imposes content-based restrictions on protected speech, all are subject to strict scrutiny under the First Amendment. And all three proposals fail such strict scrutiny.

A. Strict scrutiny applies to the FCC's specific proposals to regulate violent television programming.

Government regulation of expression based on its content is generally subject to strict scrutiny, the most exacting First Amendment standard of review. *RAV v. City of St. Paul*, 505 U.S. 377, 382 (1992). Such regulations are "presumptively invalid," *id.* at 382, and are void unless "narrowly tailored to promote a compelling government interest" in the strong sense that, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature *must use the alternative.*" *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) (emphasis added).

The FCC Report acknowledges that strict scrutiny normally applies to any regulation of expressive content. FCC Report at 11. We will shortly see specifically why each of the FCC's proposals would burden free speech in a way that triggers strict scrutiny. Before that analysis, however, I turn to three arguments that the FCC Report makes for its view that strict scrutiny is, as a general matter, inapplicable to almost any child-protective regulation of "violent content" on television. First, the FCC argues that strict scrutiny would not apply because "violence" (or some subset thereof) is analogous to "indecentcy" and "obscenity," regulation of which it contends is subject to a lower level of scrutiny. FCC Report at 12. Second, the FCC suggests that strict scrutiny may not apply when a legislature limits expression to protect

⁵ Even content-neutral restrictions on speech as such are constitutionally required to be narrowly tailored to serve the government's significant interests. See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). And "[a] statute is narrowly tailored [only] if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy," *Frisby v. Schultz*, 487 U.S. 474, 485 (1988), not if it is "substantially broader than necessary to achieve the government's interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

children. FCC Report at 12. Finally, the FCC argues that strict scrutiny “does not apply to the regulation of broadcast speech.” FCC Report at 11. None of these claims has merit.

1. Any analogy between “violence” and “indecent” or “obscenity” cannot support evaluating the FCC’s proposals under anything less than strict scrutiny.

Although acknowledging that depictions of violence generally are subject to strict scrutiny, the FCC Report contends that a subset of violent depictions—such as “excessively violent programming”—could be regulated under a lower standard of scrutiny because it is analogous to “indecent” or “obscenity.”

First, the FCC Report argues that depictions of violence may be deemed “excessive” if they are “patently offensive” in the same way that indecent programming is. So defined, the Report contends, “excessively violent programming, like indecent programming, occupies a relatively low position in the hierarchy of First Amendment values because it is of ‘slight social value as a step to truth.’” FCC Report at 12. But even assuming that “excessively violent” programming could be analogized to “indecent” programming, the FCC’s argument would rest on a fundamentally flawed premise: namely, that regulations of “indecent” programming can be evaluated under a standard more forgiving than strict scrutiny. The FCC’s sole support for this premise is *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), in which a three-justice plurality of the Supreme Court appeared to apply a standard other than strict scrutiny to the FCC’s sanction of an indecent radio broadcast. But *Pacifica* is no longer good law on this point, and the FCC inexplicably ignores the Supreme Court’s subsequent pronouncements about the level of scrutiny that applies to regulation of indecent content. For example, in *Sable Communications v. FCC*, 492 U.S. 115 (1989), the Supreme Court unanimously applied strict scrutiny to evaluate the constitutionality of a prohibition on indecent dial-a-porn messages. *Id.* at 126. And in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), the Supreme Court unanimously applied strict scrutiny to evaluate the constitutionality of a time channeling requirement for cable television operators who primarily carried “sexually-oriented programming.” *Id.* at 813; *see also id.* at 831 (Scalia, J., dissenting) (applying strict scrutiny but finding that the test was satisfied); *Id.* at 836 (Breyer, J., dissenting) (same). Thus, the FCC’s analogy between violent and indecent programming does not justify the application of a lower standard of scrutiny.

Second, the FCC Report seems to suggest that a lower standard of scrutiny applies to regulations of violent television because depictions of violence are directly analogous to obscenity. FCC Report at 11 n. 56. The Supreme Court has recognized obscenity as one of the “few limited areas” of essentially “unprotected” speech in which it “has permitted restrictions upon the content of speech” without requiring application of strict scrutiny. *RAV*, 505 U.S. at 382–83. But any superficial similarity between obscenity and “excessive” violence does not lessen the First Amendment protection to which restrictions of violent television programming are subject.

As an initial matter, the violent character of something depicted on television, no matter how extreme, does not in itself render the depiction “obscene,” as that term has long been understood in the First Amendment context, because the Supreme Court has clearly “confine[d] the permissible scope of . . . regulation [of obscenity] to works which depict or describe sexual conduct.” *Miller v. California*, 413 U.S. 15, 24 (1973); *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 n. 10 (1975) (“[T]o be obscene ‘such expression must be, in some significant way, erotic.’”) (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971)); *Roth v. United States*, 354 U.S. 476, 487 (1957) (“Obscene material is material which deals with sex in a manner appealing to prurient interest.”).

Nor is the notion that certain depictions of violence may in some unspecified sense be *like* obscenity sufficient to justify applying a lower standard of review to television violence. Testing that proposition, certain opponents of violent programming have suggested adapting the definition of obscenity from *Miller v. California* to cover television violence, so that programming would be deemed “excessively violent” if, *e.g.*,

1. Taken as a whole and applying contemporary community standards, the average person would find that it has a tendency to cater or appeal to morbid interests in violence . . . ; and
2. It depicts violence in a way which is patently offensive to the average person applying contemporary adult community standards . . . ; and
3. Taken as a whole, it lacks serious literary, artistic, political, or scientific value. . . .

Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 687 (8th Cir. 1992). In my view, the Supreme Court would have to apply strict scrutiny to regulations based upon any such “definition by substitution.” To be sure, the definition is “derived” from obscenity in the mechanical sense that it simply substitutes the word “violence” for the word “sex.” But one could as easily replace “sex” in the *Miller* definition with such words as “suffering,” “tragedy,” “death,” “disability”—or, for that matter, “genius,” “comedy,” or even “life.” Analytically, each resulting derivative of the *Miller* test would be every bit as close an analogue to obscenity as is the suggested definition of “excessive violence,” but these simple substitutions could not for that reason alone delineate categories of speech that enjoy reduced First Amendment protection. The government could not, for example, obtain less stringent First Amendment review by regulating speech that “appeals to morbid interests in comedy” or that “depicts genius in a way which is patently offensive to the average person.”

This definition-by-substitution approach is also inconsistent with the First Amendment. The Supreme Court has adopted an extremely strict and carefully “limited categorical approach” to defining the classes of less-protected speech. *RAV*, 505 U.S. at 383. “The Supreme Court historically has confined the categories of unprotected speech to defamation, fighting words, direct incitement of lawless action, and obscenity,” *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 66 (2d Cir. 1997), and it has refused to create or “find” additional categories that receive something less than strict scrutiny. The lower courts, accordingly, have uniformly applied First Amendment strict scrutiny to laws defining impermissible depictions of violence based upon *Miller’s* definition of obscenity. See, e.g., *Eclipse*, 134 F.3d at 64 (“patently offensive” content lacking “serious literary, artistic, political and scientific value”); *Webster*, 968 F.2d at 684 (“patently offensive” content lacking “serious literary, artistic, political and scientific value”).

This carefully limited approach reflects the well-founded fear that a looser view of these less-protected categories—one fastening on such *adjectives* as “morbid,” “patently offensive,” and absence of “serious . . . value,” and ignoring the operative *nouns* of “defamation,” “fighting words,” “incitement,” and “obscenity”—could sharply and unjustifiably delimit the scope of free speech. Opponents of television violence seek to analogize certain “excessive” depictions of violence to obscenity in part because they believe that such violence is no less psychologically harmful than obscenity, especially to young children. But such generic and decontextualized reasoning potentially opens the door to regulations of many other types of speech that people may think is psychologically harmful, from caricature, to blasphemy, to flag burning, *Texas v. Johnson*, 491 U.S. 397 (1989), to rude political speech, *Cohen v. California*, 403 U.S. 15 (1971) (“F--- the Draft”), to disrespectful remarks about parents and other authority figures, *Watts v. United States*, 394 U.S. 705, 706 (1969) (*per curiam*) (“If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”). These examples of fully protected speech, like certain instances of “excessive” violence, may bear some superficial similarities to obscenity: they may disgust certain people, violate some community standards of propriety, and appeal to what some people deem base, immoral, or unseemly instincts. But if the First Amendment is to remain a robust protection of free speech—and if obscenity, incitement, and the like are to remain the exceptions, rather than the norm—these arguable similarities cannot justify lowering the level of First Amendment protection enjoyed by such expression.

Finally, it might be argued that watching violent, terrifying, or other extreme events can excite some people physically in a way that resembles reflexive reactions to sexual material. But that proves far too much. Athletic contests, religious rituals, political rallies, and certain kinds of music are all famously capable of exciting passionate and even physically aggressive visceral responses—including responses that many might deem negative or even patently offensive. Freedom of speech would be in grave jeopardy if the presence of a subliminal or physiological component in a communication’s range of psychological effects could strip it of constitutionally protected status.

2. Strict scrutiny applies to regulations intended to protect minors.

The FCC Report suggests that a lower standard of review applies to regulations of speech that are motivated by an attempt to protect children. FCC Report at 3. This argument relies upon *Ginsberg v. New York*, 390 U.S. 629 (1968), in which the Supreme Court upheld a state law prohibiting the sale of sexually indecent (but not obscene) materials to minors. But *Ginsberg* does not stand for the general rule that something less than strict scrutiny applies to laws seeking to protect minors by replacing parental control of the influences to which growing children are subject with

central governmental control of those influences.⁶ Rather, *Ginsberg* holding rested on a notion of “variable obscenity” that allowed the definition of obscenity to be adjusted for different target audiences, so that material merely indecent for adults could be deemed obscene for minors. 390 U.S. at 638; *cf. Ginsburg*, 383 U.S. at 472–73 (noting that material can be obscene when marketed to certain audiences but non-obscene otherwise). As explained above, however, the logic that relativized the definition of obscene material in terms of the audience to which such material is directed has no logical analogue in the realm of violent but non-obscene depictions.

Apart from the illogic of extrapolating notions of “variable obscenity” to the realm of violent depictions, the idea that children’s special malleability counts *in favor* of government control turns the First Amendment on its head. The Supreme Court has recognized the powerful and (as some people believe) detrimental influence that the government can exert on young minds with such control, in several decisions denying the government the power to shape the education of children as it saw fit. For example, in *Wisconsin v. Yoder*, 406 U.S. 205, 211 (1972), the Court held that the state could not compel Amish adolescents to attend public or private schools because the Amish faith of their parents taught that immersion in a school’s regimen together with non-Amish of similar age would expose the Amish adolescents to values “in marked variance with Amish values and the Amish way of life.” Similarly, in *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923), the Court struck down a law prohibiting parents from engaging educators to teach foreign languages to their children, comparing that law unfavorably to the Spartan practice of housing young boys in military barracks “[i]n order to submerge the individual and develop ideal citizens.” Centralized control over the materials available to children may well flout not only the wishes of those children but also of their parents, who may have very different ideas about the kinds and levels of violence that are appropriate for their children to view. Indeed, some children and parents may be convinced that it is valuable to allow their children to observe the very depictions of violence from which other parents might wish to protect theirs, believing that “[t]o shield children right up to the age of 18 from exposure to [such] violent descriptions and images would . . . [be] deforming; it would leave them unequipped to deal with the world as we know it.” *Kendrick*, 244 F.3d at 577.

Finally, just as children have a First Amendment right to *see* violent television programming that government, but not their parents, wish them not to see, so broadcasters, cable/satellite operators, artists, and other content providers have a right to *furnish* that programming. “[T]he government cannot silence protected speech by wrapping itself in the cloak of parental authority.” *IDSAs*, 329 F.3d at 960.

I do not mean to suggest that parents have no legitimate concerns about allowing their children to see violence on television. My point is simply that centralized government regulation of television content is not the constitutionally appropriate way to respond to such concerns. Under the First Amendment, regulation of this sort does not receive a free pass simply because it is motivated by, concerned with, or addressed to children. Rather, any such regulation must be evaluated under the same standard that applies to *all* restrictions on speech: strict scrutiny.

3. Strict scrutiny applies to regulations of broadcast television content.

The FCC Report contends that strict scrutiny would be inapplicable to regulation of the “violent content” of broadcast television programming. FCC Report at 11. To support that proposition, the FCC cites two justifications: (i) broadcasting’s supposed “uniquely pervasive presence in the lives of all Americans,” and (ii) broadcasting’s supposed “accessibility to children, coupled with the government’s interests in the well-being of children and in supporting parental supervision of children.” FCC Report at 11 (internal quotations omitted). For these reasons, the FCC argues, broadcasting traditionally has been afforded a lower level of First Amendment protection than other means of communication (such as cable), purportedly giving the government greater leeway to impose content-based regulations. FCC Report at 11.

Unfortunately, the FCC is caught in a time warp. The justifications for allowing government regulation of content on broadcast television date back several decades to the Supreme Court’s decisions in *Red Lion v. FCC*, 395 U.S. 367 (1969), and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). In *Red Lion*, the Court observed that “if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves.” 395 U.S. at 389. “Because of the

⁶On the contrary, as we will see shortly, the Court has generally applied strict scrutiny to laws that might interfere with the ability of parents themselves “to make decisions concerning the care, custody, and control of their [own] children.” *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.” *Id.* 390. In *Pacifica*, the Court upheld an after-the-fact fine for the airing of “seven dirty words” in the course of a comedy monologue broadcast over the radio. In that case, the Court took note of the listener’s privacy interests in controlling what he hears in his own home or car and concluded that, “[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content” on broadcast radio. 438 U.S. at 748.

In my view, however, broadcast television can no longer be considered the unloved stepchild of the First Amendment—to the extent that its subordinate status was ever justified to begin with. This is true for two reasons. First, technological advances have made broadcast television more similar to other media such as cable, content-based regulation of which is indisputably subject to strict scrutiny. *See Columbia Broadcasting Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 102 (1973) (“[T]he 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.”). Second, to the degree that broadcast television retains features distinct from other television media, these distinctions cannot justify the *kinds* of content-based regulation of speech that the FCC Report proposes. *Cf. Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 639 (1994) (“[W]hatever relevance these physical characteristics may have in the evaluation of particular cable regulations, they do not require the alteration of settled principles of our First Amendment jurisprudence.”).

The Supreme Court’s post-*Red Lion* case law on this subject, while paying lip service to the anomalous place of broadcast in First Amendment jurisprudence, has increasingly recognized that broadcast media have grown ever more similar to other media, such as cable, that enjoy undiluted First Amendment protection. The Supreme Court first began to dismantle the foundations of broadcast media’s subordinate First Amendment status as early as 1984, in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), which struck down an act of Congress forbidding federally funded, noncommercial broadcast stations from engaging in editorializing. The Court assumed that, under *Red Lion*, the unique features of broadcast media “required some adjustment in First Amendment analysis.” *Id.* at 377. But in invalidating the Federal statute, the Court applied a standard strikingly similar to the normal strict scrutiny test that applies to most regulations of speech: it held that Congress’s restriction of federally funded broadcast media must be “narrowly tailored to further a substantial governmental interest,” *id.* at 380, and that Congress could not burden free speech when its “interest[s] can be fully satisfied by less restrictive means that are readily available,” *id.* at 395.

The next significant erosion in the subordinate status of broadcast media occurred when the Supreme Court seriously examined the First Amendment implications of cable television in *Denver Area Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996). A four-justice plurality noted that “cable and broadcast television differ little, if at all,” *id.* at 748, because “cable television . . . is as accessible to children as over-the-air broadcasting, if not more so,” and because, like broadcast television, “[c]able television systems . . . have established a uniquely pervasive presence in the lives of all Americans,” *id.* at 744–45. (The U.S. court of Appeals for the Second Circuit recently reached the same conclusion, noting that “it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children.” *Fox, supra*, slip op. at 36.) Of course, these two factors had been cited by *Pacifica* to justify the Court’s application of a lower standard of review to regulations of broadcast media. Nevertheless, when the Court again considered the constitutionality of cable regulations in *Playboy*, it did not hold that cable media enjoyed less First Amendment protection even though, like broadcasting, it had become pervasive nationally and accessible to children. 529 U.S. at 813–14, 826–27. Rather, the Court insisted that strict scrutiny must apply to content-based restriction of expression on cable television, thus implicitly calling into question the continued validity of *Pacifica* rationales for subordinating broadcast media under the First Amendment.

This growing doctrinal merger between broadcast and non-broadcast media in First Amendment jurisprudence properly recognizes the outdated nature of the technological assumptions that initially undergirded the “broadcast exception.” For instance, the *Pacifica* Court found that broadcast radio was “uniquely accessible to children” in an era where voluntary blocking technologies such as the V-Chip did not exist; hence, in *Playboy*, the Supreme Court applied strict scrutiny to regulations of cable television largely in reliance on the “key difference” that only “[c]able systems had the capacity to block unwanted channels on a household-by-household

basis.” 529 U.S. at 815. Today, however, this distinction has dissipated, as more households access broadcast channels through their cable or satellite systems, and as more technology becomes available to block programs on broadcast as well as non-broadcast television, as the FCC Report implicitly acknowledges. *Fox, supra*, slip op. at 38 (“If the *Playboy* decision is any guide, technological advances [such as the V-Chip] may obviate the constitutional legitimacy of the FCC’s robust oversight.”).

Another technological justification noted above for applying a lower level of scrutiny to broadcast regulations has been spectrum scarcity. *See Red Lion v. FCC*, 395 U.S. 367 (1969); *Turner*, 512 U.S. at 637 (referring to “the unique physical limitations of the broadcast medium”). The limited number of frequencies available for over-the-air broadcasts has traditionally been cited as a basis for government regulation of broadcasting to prevent signal interference (when two broadcasters use the same frequency) and to ensure a sufficiently broad range of voices on the airwaves. *Id.* at 638.

But technological changes have greatly eroded this argument as well. Broadcasters can now use ever narrower bands of the spectrum, vastly increasing the number of channels that can be transmitted over the air without signal interference. Moreover, the expansion and increasing availability of alternative forms of communication, such as cable and the Internet, have vitiated any asserted government need to regulate the content of broadcasting to promote a diversity of communications. *Cf. League of Women Voters*, 468 U.S. at 376 (twenty years ago, acknowledging “[c]ritics [who] charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete”). As formerly distinct media converge, any basis for distinguishing among television, newspapers, and the Internet dissolves: any of us can read the *Wall Street Journal* in paper or on the Internet, and those who miss episodes of *Ugly Betty* or *Grey’s Anatomy* can watch the shows in their entirety through ABC’s website. *See Fox, supra*, slip op. at 38 (“The proliferation of satellite and cable television channels—not to mention Internet-based video outlets—has begun to erode the ‘uniqueness’ of broadcast media.”).

Moreover, assertions about spectrum scarcity beg the question as to whether any particular content-based regulation can be justified. Even at the time, the Court’s scarcity rationale in *Red Lion* at most was held to justify regulation to “increas[e] the diversity of speakers and speech”; it never “justif[ied] censorship” of the type being proposed by the FCC with regard to violent television programming. *See Pacifica*, 438 U.S. at 770 n. 4 (Brennan, J., dissenting); *see also League of Women Voters*, 468 U.S. at 379 (characterizing *Red Lion* as allowing the government to advance its interest “in ensuring balanced presentations of views in this limited medium and yet pos[ing] no threat that a broadcaster would be denied permission to carry a particular program or to publish his own views”). Indeed, the majority in *Pacifica* did not rely at all on notions of spectrum scarcity. Whatever the validity of the technological distinctions historically drawn between broadcast and non-broadcast media, the FCC cannot cite these distinctions to support the kinds of content-based, speech-limiting regulations that it proposes as a response to television violence.

The Supreme Court’s post-*Red Lion* and *Pacifica* case law thus reflect its awareness that the historically anomalous First Amendment treatment of broadcast media has become ever less justified over time, evaporating any basis for withholding strict scrutiny from content regulation of broadcast television programming.

B. Under strict scrutiny, the FCC’s proposals share a common flaw: they are not the least restrictive means to satisfy the government’s interests.

The government is strictly limited in the tools with which it may regulate speech. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975). Assuming that the goal of limiting children’s access to violent television programming is a compelling interest, regulation of speech to achieve that goal is “unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.” *Reno v. ACLU*, 521 U.S. at 874; *see also Sable Commc’ns*, 492 U.S. at 126 (“The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”). The “least restrictive means” test “is the most demanding test known to constitutional law.” *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997).

Here, a large number of less restrictive alternatives exist to control the availability of violent television programming to children. Crucially, all of these alternatives avoid the problems posed by the FCC’s proposals by empowering parents rather than government to control what children see, thus fitting far more com-

fortably within the framework that the First Amendment establishes as the baseline for reconciling a system of free expression with the threats that some forms of speech might pose to some children. The FCC criticizes only a small subset of these alternatives, but its criticisms—aside from being too narrowly focused—are both legally immaterial and factually inaccurate.

1. Many less restrictive alternatives exist to respond to violent television programming.

The FCC Report surveys only a small fraction of the options available, limiting its discussion of current technologies to the V-Chip and cable operator-provided parental controls, coupled with voluntary ratings systems. But the FCC substantially underreports the extent to which existing technologies can give effect to the government's goal of limiting the exposure of children to television programming that their parents deem unacceptably violent. Parents have access to a wide range of tools—shortchanged or ignored by the FCC Report—with which they can limit their children's exposure to such programming should they wish to do so. As Commissioner McDowell notes in his separate statement, “Never have parents been more empowered to choose what their children should and should not watch.” FCC Report at 37.

First, V-Chips are available in all but the smallest TVs (that is, all TVs bigger than a piece of legal paper or a laptop computer) manufactured since 2000.⁷ The upcoming transition to digital television, scheduled to take place shortly after the next Presidential election, will make V-Chip technology universal.⁸

Second, V-Chip-like devices are also available on nearly all cable and satellite services, allowing parents to block either entire channels or just those shows that the parents believe include unacceptably violent (or otherwise objectionable) content.⁹ Furthermore, on-screen guides are standard features of most cable and satellite services, and almost all cable and satellite providers allow viewers to establish special menus tailored to their own preferences so as to block channels they do not want their children to watch. Two examples are Locks & Limits on DIRECTV and Adult Guard on DISH Network, which Commissioner Adelstein mentioned in his statement accompanying the FCC Report. These parental controls are readily available to the 87.7 percent of American households that currently subscribe to cable or satellite services.¹⁰

Third, Parents can choose to subscribe to family-friendly cable and satellite options, such as Comcast's Children and Family channels, DISH Network's Family Pak, and DIRECTV's Family Choice Plan, which enable individual households to limit their children to child-friendly content.

⁷As the FCC acknowledged in its report, under a 1996 amendment to Title III of the Communications Act, all televisions sets manufactured in the United States or shipped in interstate commerce with a screen larger than 13 inches must be equipped with a “V-Chip” that can be programmed to block programming that parents do not want their children to view. Even if it is correct that only half of televisions in use are equipped with V-Chips, FCC Report at 13, that is irrelevant in light of the fact that 100 percent of new televisions available for purchase are equipped with V-Chips. And while it is up to individual parents to decide whether to use it, information on using the V-Chip is readily available. The FCC itself has posted a website that gives detailed instruction to parents on how to use the V-Chip, and industry and private groups have provided similar information via websites and tutorials. See Adam Thierer, *The Right Way to Regulate Violent TV* at 8, Progress and Freedom Foundation (May 10, 2007); see also <http://www.controlyourtv.org> (industry-sponsored site explaining controls available, and offering information on how to use them).

⁸The Deficit Reduction Act of 2005 requires that analog television broadcasting cease on February 17, 2009. See Pub. L. 109–171 (Feb. 8, 2006), §3002(b). After that, consumers will need to obtain a digital receiver or a set-top converter (both of which will include a V-chip), or receive television from cable or satellite systems that enable parents to block programming using the same ratings system.

⁹Although digital cable and satellite control boxes are more advanced, both analog and digital cable and satellite boxes allow parents to block individual channels and lock them with passwords. *The Right Way to Regulate Violent TV* at 9–10. Cable subscribers without set-top boxes also can request that cable providers block channels from coming into their homes. *Id.* at 9. See also U.S.C. 544(d)(2) (providing that “[i]n order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber”). Since March 2004, cable companies providing services to 90 percent of cable subscribers voluntarily committed to providing blocking service for free. See http://i.ncta.com/ncta_com/PDFs/ControlyourTV/Take%20Control%20FAQS%204-27-05.pdf.

¹⁰Nielsen Television Index, May 2007.

Fourth, Parents can use time-shifting technologies (such as VCRs and DVRs) to record certain programs they deem appropriate for their children, and allow their children to watch only pre-recorded programming.

Fifth, rents can employ a number of after-market solutions to limit the channels their children watch and the time of day their children are allowed to watch television, such as the TV Channel Blocker or various timers that allow televisions to work only at certain times.¹¹

Sixth, rents can watch television with their children and/or establish and enforce rules about what children can watch and when they can watch it. Many resources, such as the Pause, Parent, and Play Project,¹² provide resources enabling parents to involve themselves directly in the programming that their children see.

There are also a number of ratings systems that parents can access to guide their choices in using all of the above tools. In addition to the industry's voluntary ratings program, many independent groups provide ratings guides that use their own criteria to tell parents what may or may not be appropriate for their children to watch. For example, the Parents Television Council provides the "Family Guide to Prime Time Television,"¹³ Common Sense Media provides its own ratings based on what their members think is appropriate for children in six age brackets covering toddlers to teenagers,¹⁴ and PSV Ratings provides a Family Media Guide that provides parents' own, individual views about suitability.

All of these alternatives, and the voluntary ratings systems that accompany them, serve the government's interests in protecting children and increasing parental control while being far less restrictive in their effect on First Amendment rights. Two features of these alternatives are crucial: they allow more fine-grained blocking of violent programming, so that blocking can be done by subject matter, time, channel, program, show, and so on; and they accomplish this blocking by empowering parents rather than empowering government. As a result, these voluntary technologies impose a significantly smaller burden on First Amendment speech rights. These alternatives foreswear imposing burdens of any sort at the *source* of speech and instead strengthen the ability of each individual household to govern the content that reaches children. They do not restrict access to programming across the board, denying such access even to the vast majority of American households that contain no young children. Moreover, rather than depriving parents of their right to provide their children with violent programming that they think is appropriate or even necessary (such as war movies), parents will retain freedom to decide for themselves what is appropriate for their younger children.

On these grounds the Supreme Court has signaled approval of these voluntary measures as less restrictive alternatives to centralized regulations such as time channeling and unbundling. In *Denver Area*, in the course of invalidating mandatory segregation and blocking measures for cable television, the Court noted that voluntary user-initiated blocking technologies, including the V-chip, "are significantly less restrictive" and criticized Congress for not "explain[ing] why . . . [such] blocking alone . . . cannot adequately protect . . . children from ['indecent'] programming." 518 U.S. at 756. Four years later, in *Playboy*, the Court rejected mandatory scrambling and time-channeling provisions for pornography broadcast on cable in part because it was not persuaded that Congress had sufficiently considered the merits of voluntary user-initiated blocking. 529 U.S. at 822. Finally, in *Reno v. ACLU* the Court relied on the existence of less restrictive, potentially effective alternatives to content-based regulation—including "tagging" indecent Internet material in a way that "facilitates parental control of material coming into their homes"—to strike down a congressional ban on indecent material on the Internet. 521 U.S. at 879. These precedents demonstrate the priority of these less restrictive means under the First Amendment.

Congress itself has recognized that these alternatives do present less restrictive means of protecting children. In the legislation requiring the V-Chip and calling for a complementary voluntary rating system, Congress stated that the initiative was intended to "empower[] parents to limit the negative influences of video programming that is harmful to children," Pub. L. 104-104, § 551(a)(8), and found that "[p]roviding parents with timely information about the nature of upcoming video programming and with the technological tools that allow them easily to block vio-

¹¹ These after-market units can be programmed to block cable channels that parents do not wish to see in their home, or restrict the time of day or total numbers of hours that their children are allowed to watch television. These units include special remote controls that limit children to a certain group of channels. *Id.* at 10-12.

¹² See <http://www.pauseparentplay.org/>.

¹³ Available online at <http://www.parentstv.org/PTC/familyguide/main.asp>.

¹⁴ Available online at <http://www.common sense media.org/tv-reviews/>.

lent, sexual, or other programming that they believe harmful to their children is a nonintrusive and narrowly tailored means of achieving that compelling governmental interest.” *Id.* § 551(a)(9). Congress’s own recognition of these less restrictive means to achieve the same goal is an especially compelling indication that mandatory restrictions would be unconstitutional. *See Boos v. Barry*, 485 U.S. 312, 329 (1988) (concluding that Congress’s implementation of a less-restrictive measure “amply demonstrates that the [challenged speech restriction] is not crafted with sufficient precision to withstand First Amendment scrutiny”); *see also Denver Area*, 518 U.S. at 758 (“Congress’s different, and significantly less restrictive” V-Chip solution suggests “that the more restrictive means are not ‘essential.’”).

2. These less restrictive alternatives embody the parent- and individual-centered structures for regulating speech that the Supreme Court has recognized as preferred by the First Amendment.

Mandatory government controls over speech content conflict at their core with the system of free expression established in this country—a system that eschews centralized controls of speech in favor of allowing individuals to decide for themselves what they will read, watch, or observe, and allowing parents and families to decide what their children should be exposed to as they mature. In this system, the government may step in to override personal choice only when individuals exposed to unwanted materials constitute a “captive audience.” Short of that circumstance, the system leaves it to individual adults to avert their gaze from speech that they deem objectionable and to shield their children from such speech. *See, e.g., Cohen v. California*, 403 U.S. 15, 21 (1971).

Within this system, the Supreme Court has preferred allowing *individuals*, but not the government, to impose their own “selective restrictions” on speech that “intrudes on the privacy of the home.” *Erznoznik*, 422 U.S. at 209. A pair of Supreme Court decisions illustrates the basic principle. In *Rowan v. Post Office Department*, 397 U.S. 728, 737 (1970), the Supreme Court upheld a Federal statute empowering individuals to give notice to the Post Office that they would rather not receive mailings from certain parties. But in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983), the Court invalidated a Federal statute through which the government prohibited the mailing of unsolicited ads for contraceptives. The *Bolger* Court explained that it has “recognized the important interest in allowing addressees to give notice to a mailer that they wish no further mailings [citing *Rowan*]. But we have never held that the government itself can shut off the flow of mailings to protect those recipients who might potentially be offended.” *Id.*

The Supreme Court has only once allowed the FCC to curb speech being broadcast into the home. It did so nearly three decades ago in *Pacifica*, 438 U.S. 726 (1978), a decision that, as discussed earlier, was explicitly limited to a unique situation: a comic monologue focused on words with explicit sexual meaning, presented in no broader literary or entertainment context than one highlighting their forbidden character, broadcast on the radio. But the Court upheld the regulation in *Pacifica* in large part because, under the technology available at the time, there was no other way to “protect the listener or viewer from unexpected program content,” *Pacifica*, 438 U.S. at 748—a concern that subsequent technological innovations have alleviated, at least as to television. *See supra* Part III(B)(1).

The parental controls now available observe the line established in *Rowan* and *Bolger* that allows individuals and parents to edit what comes into the home by voluntary blocking, but that does not allow the government to prevent government-defined content from going into the home in the first place. Such controls are not, of course, foolproof, and their use entails an investment of time and energy to supervise the television viewing of one’s children. But the salient point is that, taken together, these voluntary, user-initiated controls essentially allow parents to prevent their children from watching television programming that *they* believe contains unacceptably violent content. This gives effect to the government’s goal of protecting minor children from viewing such content to the degree the individual parents involved share that goal and think it applicable to their own children.

Moreover, these parental controls are *more* effective than government regulation at letting children see what their parents *want* them to see. In *Reno v. ACLU* and *Playboy*, the Supreme Court left no doubt that the government has no *independent* interest in protecting children from objectionable content beyond the interest of assisting those parents who desire to shield their children from such speech. *See Reno v. ACLU*, 521 U.S. at 865, 877–78; *Playboy*, 529 U.S. at 811, 813. The Commission may not, for example, substitute its judgment for that of parents who might consider it entirely appropriate that their children be exposed to a realistic depiction of the life of police officers or hospital workers. Under our system, such judgments are for parents, not the government, to make. *See Troxel v. Granville*, 530 U.S. 57,

66 (2000) (collecting multiple opinions “recogniz[ing] the fundamental right of parents to make decisions concerning the care, custody, and control of their children”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”).

3. The FCC’s criticisms of these alternatives do not save its proposals under the First Amendment.

The FCC Report acknowledges but criticizes a number of less restrictive alternatives, focusing primarily on the V-chip, cable blocking technologies, and the voluntary ratings system. These criticisms fail on both factual and legal grounds and do not excuse the government from its obligation to use the less restrictive means outlined above.

Inexplicably, the FCC Report simply ignores almost all of the alternative technologies discussed above—a silence that earns a sharp rebuke from Commissioner Adelstein. See FCC Report at 32–33. As a result, the Report never tackles the legal significance of the ever-improving voluntary blocking technologies now available to parents, even though the First Amendment mandates a careful appraisal of such alternatives.

Moreover, the FCC Report engages in a broad-brushed criticism of the V-Chip and the voluntary ratings system without acknowledging a core analytic confusion that renders its criticisms incomplete and even incoherent. Blocking technology that fails to shield children from things the *government* might prefer they not see but that their parents *would* like them to see (or are at least *indifferent* about their seeing) cannot on that account be deemed constitutionally ineffective. Yet much of the evidence cited by the FCC Report for the ostensible failings of existing alternatives focuses on statistics about parental inaction that give no indication that determined parents are *unable* to control what their children end up watching. For instance, the FCC reports that “only 15 percent of all parents have used the V-chip,” and “20 percent of parents know they have a V-chip, but have not used it.” FCC Report at 14. But these numbers, even if accurate, say nothing about whether parents are dissatisfied with the V-chip, whether they instead use one of the many other methods of controlling what their children watch, or whether, as the Supreme Court noted in *Playboy*, they simply responded to the “crisis” of television violence “with a collective yawn.”¹⁵ 529 U.S. at 816. In other words, that the children of such parents may be seeing content that *the government* would rather they not see certainly does not establish that they are seeing content that *their parents* would rather they not see. Given the First Amendment’s preference for parent- and individual-focused voluntary blocking over more restrictive forms of speech regulation, many of the FCC’s criticisms are misdirected.

The FCC Report also fails to recognize the full legal import of the least-restrictive-means requirement. Even assuming, contrary to the evidence, that the alternatives listed above are not fully as effective as the FCC’s proposals, those proposals would still flunk strict scrutiny because a method of achieving a compelling government interest must be recognized as a less restrictive means even if it is not absolutely effective. The Supreme Court has never required a guarantee that *no* inappropriate material will reach children, nor has it accepted the absence of such assurance as a basis to reject a less-restrictive alternative. In *Denver Area*, the Court stated: “No protection, we concede, short of an absolute ban, can offer certain protection against assault by a determined child. We have not, however, generally allowed this fact alone to ‘justify reduc[ing] the adult population . . . to . . . only what is fit for children.’” 518 U.S. at 759. Accordingly, in *Sable Communication*, the Supreme Court invalidated a blanket prohibition on indecent and obscene commercial telephone messages transmitted interstate. Access code and screening options that were available to block children’s access to such messages “provide[d] the means of dramatically reducing the number of calls from minors” and were described as having the potential to be “very effective” but “not foolproof.” 492 U.S. at 130 n. 10. Despite the fact that these options were still largely untested and could likely be overcome by “the most enterprising and disobedient young people,” the Court still deemed

¹⁵ In fact, the study cited by the FCC for its figures itself calls into question the FCC’s conclusion that the V-Chip is ineffective. The study reports, for instance, that “[t]he vast majority of parents who have used the V-Chip say they found it useful, including 61 percent who say it was ‘very’ useful and 28 percent who say ‘somewhat’ useful,” and it notes that “[a]mong parents who are aware that they have a V-Chip but have chosen not to use it, 60 percent say the main reason is that an adult is usually nearby when their kids watch TV, and 20 percent say it’s because they trust their children to make their own decisions.” Kaiser Family Foundation, *Parents, Media and Public Policy*, at 7 (Fall 2004).

them less restrictive means that invalidated the unquestionably *more* effective blanket prohibition. *Id.* at 130.

In any event, the V-Chip and other technologies that could be used to block violent programming are substantially more accessible, and in significantly wider use, than other technologies that the Supreme Court has deemed effective and constitutionally preferred alternatives to content regulation. In *Reno v. ACLU*, the Court cited as an effective alternative software that was then just a “mere possibility,” *Playboy*, 529 U.S. at 814 (discussing *Reno v. ACLU*), and that “would soon be widely available,” *Reno v. ACLU*, 521 U.S. at 876–877 (emphasis added). To obtain that software, Internet users were required to affirmatively seek out and pay for it. The V-chip, by contrast, is already included in all but the smallest new televisions, with similar technology already ubiquitous for cable and satellite subscribers, and unlike Internet-blocking software, these technologies do not require periodic upgrades that must be paid for and installed.

Finally, the FCC Report criticizes certain existing technologies for being ineffective in part because parents remain ignorant of them. But the Supreme Court’s decisions make clear that the proper response to lack of public awareness about a viable less-restrictive alternative is greater promotion and support of that alternative, not more burdensome content-based regulation. As Commissioner Adelstein notes, the FCC Report fails to explain why one should suppose that these voluntary technologies would be insufficient to serve parents’ and children’s interests if they were indeed properly publicized and supported. FCC Report at 32–33 (“Instead of rushing to conclude that . . . blocking technology does not adequately promote parental supervision and protect the well-being of children, the Commission has an obligation to advise Congress how we can attempt to improve their effectiveness. We fail to do so here.”).

In *Denver Area*, for example, the government argued that cable “lockbox” technology was not a sufficiently effective alternative because “parents would have to discover that such devices exist,” and, among other things, “learn how to block undesired programs.” 518 U.S. at 758 (quoting government brief). The Court responded that this “list of practical difficulties would seem to call, not for” more intrusive regulation, “but, rather, for informational requirements, for a simple coding system, for readily available blocking equipment,” and for other measures likely to increase effectiveness. *Id.* at 759. Similarly, in *Playboy*, the Court held that user-based blocking technology was a less restrictive alternative that rendered the statute at issue there unconstitutional, even though the evidence reflected that cable consumers had made “few requests for household-by-household blocking.” 529 U.S. at 816; *id.* (noting that “fewer than 0.5 percent of cable subscribers requested full blocking”). Because the government had failed to show that blocking technology could not be effective “if publicized in an adequate manner,” the Court concluded that the challenged legislation was invalid. *Id.*; see also *Ashcroft v. ACLU*, 542 U.S. at 669 (saying that Congress must “enact[] programs to promote use of filtering software” before declaring filtering software an ineffective alternative). Parental ignorance of less restrictive alternatives cannot justify content regulation.

C. All of the FCC’s proposals accordingly violate the First Amendment.

Applying the foregoing analysis shows that the particular proposals advanced by the FCC violate the First Amendment and would be struck down by the Supreme Court. In this section, I would like to highlight the most salient constitutional infirmities in each of the FCC’s proposals.

1. Time Channeling.

The FCC Report’s time channeling proposal would essentially ban “impermissibly violent” television programming during specified times. None of the fatal constitutional objections elaborated in the preceding sections of this submission is avoided by confining that ban to a portion of the day or night.

Vagueness: A prohibition that would be unconstitutionally vague if imposed around the clock loses none of its vagueness if imposed only during specified times. The vagueness doctrine would invalidate the prohibition during the times in which it was operative as a ban.

Over- and under-inclusiveness: Every point made above about over- and under-inclusiveness remains fully valid when the prohibition is limited to stated times of day or night. The content- and viewpoint-based character of a regulation that triggers a demand for strict scrutiny and accordingly for an exceedingly close fit is not diminished in the least by its time-limited character.¹⁶ *United States v. Playboy*

¹⁶ Although at first blush the relegation of violent content to the midnight hours may seem like a time or manner restriction, such restrictions are content-neutral only if they “are justified

Entm't Group, Inc., 529 U.S. 803, 812–13 (2000) (applying strict scrutiny to time channeling of indecent cable television because “[i]t is of no moment that the statute does not impose a complete prohibition”). Indeed, the ill-fitting character of time channeling is so egregious that it would have to be struck down under the First Amendment even if one were to ignore altogether its content- and viewpoint-based operation.

Assuming for the sake of argument that young children are harmed by seeing certain kinds of violent television programming, and that avoiding this harm is a permissible governmental objective without regard to what a particular child’s parents might believe, the fact would remain that time channeling responds to this concern far too broadly by denying such programming to vast swaths of the population that are not remotely the subjects of the government’s concern. For example, nearly three-quarters of American television homes have no children under the age of twelve,¹⁷ yet time channeling would preclude everyone in those households from receiving violent television programming *at all* during times outside the safe harbor—even though those viewers are constitutionally entitled to receive that programming, and even though broadcasters and cablecasters are constitutionally entitled to transmit that programming to them. Moreover, even those households with children will have adults and older children whom the government cannot claim a compelling interest in protecting. Those viewers will also be denied programming to which they are constitutionally entitled. The inevitable effect of time channeling is that, during large segments of the day, available television programming would be limited to material deemed fit for minors. Even disregarding the constitutional objections to centralized determination of just what material meets that description, the First Amendment does not permit the free speech rights of adults and older children to be casualties to the government’s paternalism toward the young.

Less restrictive alternatives. Nor would the time-limited facet of a proposed regulation escape the fatal criticism that individualized parental controls remain a constitutionally preferred less restrictive alternative for achieving any of the law’s child-focused objectives. The availability of such individually tailored parental technologies for child-rearing with respect to television viewing was central, for reasons already discussed, to the Supreme Court’s decision in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), to strike down a statute essentially requiring certain cable operators to time channel indecent content.

In fact, in certain ways, the V-Chip and other blocking technologies are not only less restrictive but also significantly more effective than time channeling in empowering parents to control their children’s viewing. As the Court explained in *Playboy*, blocking mechanisms enable parents to block programming deemed objectionable “at all times, even when they are not at home and even after 10 p.m.”; by contrast, “[t]ime channeling does not offer this assistance.” 529 U.S. at 825.

2. Mandatory Ratings System.

The FCC Report recommends that Congress could also respond to televised violence by reforming the current voluntary ratings and blocking system. The most significant component of the proposal is the Report’s suggestion that Congress implement an official mandatory ratings system that would require stations to display the governmentally defined “appropriate” rating for each program. FCC Report at 17. Such a mandatory ratings system would likewise violate the First Amendment for at least two reasons.

First, the definitions and guidelines imposed by a mandatory ratings system would be inherently subjective, subject to arbitrary and inconsistent interpretation by authorities, and thus impermissibly vague. Mandatory ratings systems have been uniformly rejected by the Supreme Court under the vagueness doctrine because they vest so much power in whatever government body applies and enforces the ratings with fines or other punishments. Indeed, the Court is more vigilant about the “vice of vagueness” where “expression is sought to be subjected to licensing,” and that “vice” is just as dangerous where the “regulation of expression is one of classification”—*i.e.*, mandatory ratings—“rather than direct suppression.” *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 683, 688 (1968); *see also Bantam Books, Inc. v. Sullivan*,

without reference to the content of the regulated speech.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Here, by contrast, time-channeling legislation would almost certainly require television programming *with violent content* to be segregated to certain hours. Such identification of subject matter “slips from the neutrality of time, place, and circumstance into a concern about content.” *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 99 (1972) (internal quotation marks and citations omitted).

¹⁷Nielsen Television Index, Universe Estimates 2007–2008.

372 U.S. 58, 72 (1963). Like a time-channeling solution, any mandatory ratings scheme would suffer from all the problems of subjectivity and vagueness described in Part II(A), above, and would be unconstitutional on those grounds alone.

Second, a mandatory ratings system would impermissibly force broadcasters, cable/satellite operators, and other content providers to attach to their television programming a message stating a government viewpoint about that programming, thus “[m]andating speech that a speaker would not otherwise make.” *Riley v. Nat’l Federation of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988). “[L]eading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say.” *Rumsfeld v. FAIR*, 126 S. Ct. 1297, 1308 (2006). “[T]his general rule . . . applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). Applying this rule, a plurality of the Supreme Court in *Pacific Gas & Elec. Co. v. Public Utility Comm’n*, 475 U.S. 1 (1986), struck down a regulation requiring a privately owned utility to include with its monthly bills a newsletter written by a consumer group critical of utilities. The plurality found that compelling the inclusion of this newsletter imposed an unconstitutional burden on the utility’s speech, since the regulation “impermissibly require[d] [the utility] to associate with speech with which [it] may disagree.” *Id.* at 15. Similarly, in *Hurley*, the organizers of a St. Patrick’s Day parade challenged a state statute that required the organizers to include a gay, lesbian, and bisexual group in the parade. A unanimous Supreme Court found this application of state anti-discrimination law unconstitutional. After holding that “[t]he selection of contingents to make a parade” is protected expression, 515 U.S. at 570, the Court held that, “[s]ince every participating unit affects the message conveyed by the private organizers, the state courts’ application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade.” *Id.* at 572–73. Such a requirement violated “the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.” *Id.* at 573.

A mandatory ratings system would contravene this rule by requiring television content providers to attach to their programs a government-compelled message describing—and most likely evaluating—the programs’ violent content. For example, content providers may be required to say that their program contains “violence inappropriate for children under the age of 17,” or “violence appropriate for children only with adequate parental supervision,” even if the content provider disagrees profoundly with the government’s evaluation. Such mandatory ratings are no different from a government requirement that a television program promoting abstinence disclose that scientific studies show abstinence programs to be ineffective, or a requirement that a show on global warming say that there are still significant doubts about the science behind climate change. Because such compelled speech forces speakers to affirm and disseminate beliefs with which they may disagree, they are forbidden by the First Amendment.

The FCC Report defends a mandatory ratings system by saying that “it merely requires the disclosure of truthful information about a potentially harmful product.” FCC Report at 17. The Supreme Court has indeed recognized that, “in commercial advertising,” the government may require businesses to disseminate “purely factual and uncontroversial information . . . so long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.” *Zauderer v. Off. of Disciplinary Counsel for Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985) (upholding state law requiring attorneys to disclose to contingent-fee clients that the clients may have to bear certain expenses even if they lose); see also *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 114–16 (2d Cir. 2001) (upholding state law requiring mercury labeling). But this narrow exception to the compelled-speech doctrine is inapplicable for two reasons.

First, violence ratings most assuredly are *not* the sort of “purely factual and uncontroversial information” encompassed by this exception. At the very least, a rating represents a judgment about whether the program contains “violence” and, in all likelihood, a further judgment about whether that “violence” is “gratuitous,” “excessive,” or “harmful to children.” These complex, highly subjective, and often controversial judgments cannot be passed off as simple factual statements and so do not fall under the *Zauderer* exception.¹⁸ Accordingly, the Seventh Circuit found

¹⁸Part of the controversy is essentially descriptive and deals with how something is most accurately characterized. But another part is normative: do the benefits of informing the prospective “consumer” of speech about what that consumer will encounter outweigh the costs of lost surprise, often a key element in dramatic productions?

Zauderer inapplicable to a mandatory labeling program for “sexually explicit” video games, since it found that such labels “communicate[] a subjective and highly controversial message—that the game’s content is sexually explicit.” *Entertainment Software Ass’n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006).

Second, *Zauderer* has not been applied outside the commercial-speech context—where, as the Supreme Court has held, a lower standard of scrutiny may apply to speech that does “no more than propose a commercial transaction,” *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)—but the vast majority of television programming to which mandatory ratings would be attached is not commercial speech. Television shows express ideas, they do not hawk wares.

Because strict scrutiny applies here, the availability of less restrictive means for the government to achieve its ends—namely, the existing voluntary ratings system, and the growing arsenal of voluntary blocking technologies—weighs heavily against the permissibility of a mandatory ratings system. The FCC Report gives two reasons for finding these other means ineffective: first, parents do not understand the voluntary system; and second, the ratings are often inaccurate. FCC Report at 15. The first problem cannot justify avoiding a less restrictive means; under *Playboy*, as discussed above, the government can respond to parental ignorance with a publicity campaign. One possible model is a cross-industry public education campaign on parental controls and ratings, brought in 2006 by a wide spectrum of content creators and broadcast/cable/satellite operators, that utilized public service announcements and educational websites such as *TheTVBoss.org*. The government could easily engage in a similar campaign here—and, under the First Amendment, Congress must exhaust that option before turning to content regulation. The Seventh Circuit relied on this reasoning to strike down the state law in *Blagojevich*: although the state attempted to justify mandatory labels by arguing that the game industry’s voluntary rating system was not widely understood, the court held that the state was required to adopt the less restrictive means of “a broader educational campaign about the [voluntary] system.” 469 F.3d at 652.

The second asserted problem—allegedly inaccurate ratings—also cannot justify a more restrictive mandatory ratings system.¹⁹ For one thing, nothing about the centralized or governmentally dictated nature of a mandatory ratings system ensures that it will be more accurate—and, indeed, the FCC Report acknowledges that a government-run ratings system might not improve on accuracy. FCC Report at 17. The FCC Report also does not explain why cooperation with the industry—or even encouraging alternative ratings from private institutions—could not increase the accuracy of ratings. Moreover, parents need not rely simply on published ratings to protect their children. As noted above, available technologies allow parents to block specific programs and specific channels based on their own viewing of the content, on descriptions of the shows in TV channel listings, or on descriptions from friends or other sources.

Finally, even assuming that a mandatory ratings system would be considered content-neutral, it would still violate the First Amendment because it would not be narrowly tailored to the government’s concerns. Rather than limiting the scope of its burdens to conveyers of violent television programming, a mandatory ratings system would compel speech from *all* speakers—even those who generate and distribute no violent content. For example, a content provider may be required to say that a program is “appropriate for children,” even if the provider is afraid that this description will unfairly (and inaccurately) cause viewers to believe that the program is white-washed, infantile, or of little interest to adults. Whatever the government’s power to compel speech from providers of violent content, the First Amendment prohibits it from imposing such burdens on the free speech of other content providers who do not do anything remotely objectionable.

3. Mandatory Unbundling.

The FCC Report’s final legislative proposal is for Congress to require cable and satellite operators to unbundle channels and to offer individual consumers the option to choose which channels they will receive. This unbundling could take one of two general forms. First, cable/satellite operators could provide consumers with a full slate of programming as a default, but empower consumers to “opt out” of any

¹⁹There is considerable doubt, to say the least, about whether parents in fact perceive ratings to be inaccurate. The Kaiser Family Foundation Survey cited by the FCC, *see* FCC Report at 16–18, states that “about half (52 percent) of those who have used the ratings saying that most shows are rated in a way that accurately reflects their content,” and further notes that “[t]he vast majority of parents who have used the TV ratings say they find them useful,” Kaiser Family Foundation, *Parents, Media and Public Policy*, at 5 (Fall 2004).

channels they do not wish to receive. Under this proposal, consumers either would not have to pay for opt-out channels, or would receive a refund for those channels. Alternatively, cable/satellite operators could reserve certain channels (such as those with violent content) or all channels (as in a complete à la carte regime) and require subscribers to “opt in” to those specific channels that they wish to receive. Both of these mandatory unbundling alternatives fail strict scrutiny.

a. First Amendment strict scrutiny applies to mandatory unbundling.

It is tempting to think of any unbundling requirement as a purely economic restriction not based on speech, but that view is flatly incorrect. Any unbundling requirement would be a speech-based and even a content-based regulation subject to strict scrutiny. The Supreme Court has recognized that “[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.” *Turner Broadcasting Sys., Inc. v. FCC*, 518 U.S. 622, 636 (1994). “[T]hrough original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [cable/satellite operators] seek[] to communicate messages on a wide variety of topics and in a wide variety of formats.” *Los Angeles v. Preferred Commc’ns, Inc.*, 476 U.S. 488, 494 (1986); see also *Hurley*, 575 U.S. at 570 (“Cable operators . . . are engaged in protected speech activities even when they only select programming originally produced by others.”). More specifically, *Turner* recognized that requiring cable operators to bundle certain channels against their will “interfere[d] with [their] editorial discretion.” 512 U.S. at 643–44. *Forbidding* them from bundling certain channels—especially if the decision is driven by the content of those channels—would have a similar effect: an operator’s decision to include particular channels is at least as expressive as its decision to exclude others. *Hurley*, 575 U.S. at 570 (holding that “[t]he selection of contingents to make a parade” is First Amendment speech).

In this regard, cable/satellite providers are no different from other speakers. A decision to combine or package expressive materials is a speech act distinct from the decisions to distribute its individual components, separately considered. For example, Tim O’Brien’s *The Things They Carried* is ostensibly a collection of vignettes about the Vietnam War, each of which can be read and understood separately. Together, however, their cumulative effect is a devastating exploration of the effects of combat on young soldiers. Unlike a disaggregated set, a combination of materials allows direct comparisons between the individual pieces; it allows meaning to be created through repetition and parallelism; and it allows expression that derives from the very act of combination or juxtaposition. It makes no difference that—as some people undoubtedly believe—no distinct message can be attributed to cable/satellite providers’ aggregation of channels. “[A] narrow, succinctly articulable message is not a condition of constitutional protection.” *Hurley*, 515 U.S. at 569–70. Otherwise, Congress could force newspapers to distribute by the section and forbid recording companies from packaging different songs, artists, albums, or genres into a single compilation. Nor does it make a difference that cable operators combine not just their own content but also content provided by others. Speakers often speak by invoking the words of others, but doing so does not jeopardize their First Amendment rights. See *Hurley*, 515 U.S. at 570 (noting that newspaper editorial pages, like parades, are also “compilation[s] of speech generated by other persons”).

It is true that in *Turner*, the Supreme Court applied only intermediate scrutiny—a standard lower than strict scrutiny—to uphold the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992, which required cable operators to carry the signals of certain local broadcast stations. But for a number of reasons the must-carry provisions are distinguishable from the unbundling proposed by the FCC Report.

First, the Supreme Court applied intermediate scrutiny in *Turner* because it found that the must-carry provisions were imposed “without reference to the content of speech”; not only was the statute content-neutral on its face, but Congress’s manifest purpose was simply to “preserve access to free television programming.” 512 U.S. at 643, 646. The various unbundling schemes proposed by the FCC Report and by earlier studies are quite different. Some past unbundling proposals have suggested requiring “themed tiers”; *i.e.*, each bundle of channels would be defined by a certain type of content, such as “sports,” “news,” or—for our purposes—“violent content.” Legislation mandating such unbundling would be content-based on its face—since it would expressly premise cable/satellite operators’ obligations upon the content of the channels they carried—and thus would be subject to strict scrutiny.

Even if the relevant bundles are defined in a content-neutral way, the *purpose* behind requiring bundling would render the law content-based. The FCC Report expressly recommends unbundling as a way to reduce the availability of violent tele-

vision programming. FCC Report at 21. This purpose requires evaluating even ostensibly content-neutral unbundling under strict scrutiny. “[E]ven a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys.” *Turner*, 512 U.S. at 645. This is not to say that troublesome motives expressed by individual Members of Congress can serve to invalidate a statute under the First Amendment if the statute is content-neutral on its face and serves content-neutral ends. See *United States v. O’Brien*, 391 U.S. 367, 382–83 (1968). But when the “asserted interest” offered to justify a specifically speech-burdening regulation is itself related to the suppression of that speech—as is the case here—strict scrutiny is appropriate even for facially content-neutral laws. See *United States v. Eichman*, 496 U.S. 310, 315 (1990) (striking down flag-burning statute when Congress’s purpose was to suppress that form of expression).

Second, the Court in *Turner* found that requiring the bundling of broadcast channels would not “force cable operators to alter their own messages” because “there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.” *Id.* at 655. Mandatory unbundling, however, raises distinct concerns because it directly intrudes upon a cable operator’s speech by precluding speech achievable only by combining channels. For example, a cable operator may wish to provide a public service by bundling C-SPAN or local public-access channels with more popular fare such as ESPN. Similarly, a cable operator’s decision to include adult channels—as much as another operator’s decision to exclude those channels—is an exercise of its core editorial discretion. Although the must-carry provisions at issue in *Turner* did not block this type of editorial control, unbundling legislation would. Mandatory unbundling also interferes with the speech rights of content providers in ways that the mandatory bundling in *Turner* did not. If cable/satellite operators are forbidden from transmitting certain content in a bundle, then content providers are concomitantly forbidden from offering that content in combination: e.g., a media company that wants to package a family-friendly channel (which contains no violent programming) with a sports channel or a young adult channel (both of which contain some violent programming). By contrast, the must-carry provisions in *Turner* did not prevent content providers from packaging their products in this manner.

Finally, *Turner* relied in part on the special nature of the cable industry at the point in time when the opinion was decided. But the fact that cable providers bundle content does not in any way distinguish them from other forms of media. Bundles are ubiquitous in the marketplace of ideas, as in every other marketplace: musicians package songs into albums (including “greatest hit” albums that have no central theme or concept); authors collect volumes of short stories or essays; and newspapers include multiple unrelated sections (not to mention hundreds of unrelated articles) in a single issue. Many consumers would undoubtedly prefer to purchase such items piecemeal—and, under certain circumstances, the market has responded to give them that option, as with the iTunes Store—but à la carte consumption is hardly the rule, and I am aware of no law requiring these other forms of media to distribute their speech piece by piece. Moreover, no “monopoly power” possessed by cable providers distinguishes them from other forms of media. In many areas, for example, the realities of the marketplace allow only one newspaper to operate—but nobody proposes requiring such newspapers to sell their issues article by article, or section by section. Thus, imposing an unbundling requirement on cable providers would burden their editorial discretion through a regulatory regime to which no other medium is subject, even though the reasons for imposing unbundling rely upon no distinctive feature of cable. Absent a “special characteristic” that would justify differential treatment, “[r]egulations that discriminate among media . . . often present serious First Amendment concerns” and are generally subject to strict scrutiny. *Turner*, 512 U.S. at 659–60.

b. The First Amendment scrutiny of unbundling is unaffected by the involvement of money.

Proponents of mandatory unbundling have at times suggested that unbundling can avoid strict scrutiny so long as it is only focused on the compensation that cable/satellite operators can hope to receive, rather than the content that they are empowered to convey. Thus, for instance, an opt-out unbundling program would allow cable/satellite operators to provide bundles however they saw fit, but it would simultaneously obligate them to return a portion of a consumer’s subscription costs if the consumer decided to opt out of receiving certain channels.

Such a proposal cannot escape strict scrutiny. The freedom to speak is inseparable from the freedom to decide whether to charge for that speech or, instead, to distribute it without financial remuneration. To put the point another way, “freedom of speech” encompasses not only the right to make one’s speech available without

charge; it encompasses as well the right to decide for oneself whether to seek financial gain from one's speech by offering it at a price, or instead to provide one's own speech free of charge. This principle recognizes that, given the necessities of speakers' lives and business operations, speech will often be stillborn as a practical matter absent the concomitant opportunity to profit from speaking. Granting government the power to control compensation for specific types of speech would let the government drive speech from the marketplace—and hence from the public sphere—by removing one of the principal enablers for speaking or publishing. In this sense, one's right to profit from speech is similar to one's right to seek financial reward for one's labor, as protected by the Thirteenth Amendment's prohibition on slavery, or to use one's private property for financial gain, as protected by the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments. The right to speak—or work, or own property—would be altogether hollow if the government could force people to give up any hope of compensation when engaging in these constitutionally protected activities.

The Supreme Court has recognized these basic principles. In *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964), the Court held that the First Amendment fully protected statements made in a commercial advertisement in *The New York Times*, even though the *Times* had been paid to publish that advertisement. Subsequent cases have directly recognized that the First Amendment protects the right to profit from speech as much as it protects the right to speak at all. For example, in *Simon & Schuster, Inc. v. Members of New York State Crime Victims*, 502 U.S. 105 (1991), the Supreme Court found “presumptively inconsistent with the First Amendment” a state statute that denied accused or convicted criminals the income from works describing their crimes. *Id.* at 115. Similarly, in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), the Court struck down a Federal law forbidding certain Federal employees from accepting payment for speech unrelated to their employment. Nor should any of this seem surprising. After all, the First Amendment is most commonly invoked, not by uncompensated pamphleteers, but by the publishing industry and by journalists and authors who are paid for what they write and distribute.

Like the laws struck down in these cases, an unbundling requirement would operate to bar cable/satellite operators and content providers from deriving income from speech whose content is composed of bundles of distinct channels. Congress can no more impose such a burden than it could mandate that newspapers refund subscribers for any portion of the paper that they do not wish to receive, or require musicians to refund their fans for any songs on an album that they dislike. Because the ability to profit from speech is joined at the hip with the production of speech, regulations of such income abridge First Amendment rights. See *McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring) (“The right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise.”).

Some proposals have suggested that the government implement an unbundling requirement not by directly requiring unbundling but by withholding certain government benefits—such as approval of certain changes in media ownership—from cable/satellite operators who do not unbundle. Such a strategy would impose unconstitutional conditions on the exercise of operators' First Amendment rights to bundle content and to charge for that bundling. “[C]onditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms.” *Sherbert v. Verner*, 374 U.S. 398, 405 (1963). In *Speiser v. Randall*, 357 U.S. 513 (1958), for example, the Supreme Court held that the government could not condition a tax exemption on an individual's agreement not to advocate the overthrow of the government. “To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.” *Id.* at 518. The withholding of government benefits to discourage First Amendment speech is no different from and no more constitutional than the direct impediment of that speech.

c. Unbundling's burdens on First Amendment rights cannot be justified.

The burdens imposed by an unbundling requirement cannot be justified by the government's alleged interest in protecting children from televised violence. Indeed, unbundling is a singularly ineffective tool for achieving this end. For unbundling to be even *arguably* effective at shielding children from televised violence, violent content and non-violent content would have to be segregated into different channels. But they are not: as the broad examples given by groups like the Parents Television Council show, material which has been criticized as objectionably violent can be found on almost all cable/satellite channels, in the form of police procedurals, med-

ical dramas, science fiction, physical comedy and cartoons, music videos, movies, and much else. Moreover, because an unbundling requirement would apply only to cable/satellite programming, it would leave untouched the many other media avenues by which children can become exposed to violent content—most prominently, the Internet. Thus, unbundling cannot effectively address the government’s purported interest in limiting children’s access to violent content.

Even if unbundling were effective, it would still impose an unjustifiable burden on First Amendment rights in light of better tailored and less restrictive means for the government to achieve its goals. In *Denver Area*, the Supreme Court specifically recognized the existence of such “significantly less restrictive” alternatives—including the V-chip—in striking down the unbundling statute at issue in that case, 518 U.S. at 756, and I have already highlighted the ever-increasing number of ways that parents can protect their children. By contrast, an unbundling requirement would impose restrictions on *all* channels and *all* cable/satellite operators, whether or not they contained or transmitted violent content. In light of less restrictive alternatives that are readily available, the First Amendment does not permit unbundling as a response to violent television programming.

As an economic matter, bundling allows at least some cable/satellite providers to promote new channels that have yet to find an audience and to support niche channels that have a devoted but numerically insignificant following. In this way, many believe, cable/satellite providers can ensure the continued existence of channels that would not, by themselves, justify their costs. This type of cross-subsidization and cross-marketing is common: magazines such as *Vanity Fair* use glossy spreads to support in-depth reporting; many newspapers undoubtedly rely on the greater popularity of sections such as sports and entertainment to prop up less popular sections; and musicians invariably leverage popular singles into sales for more obscure songs on their albums. From the perspective of some cable/satellite providers, being forced to unbundle would spell an end to their ability to engage in these salutary practices, potentially dooming untested or niche channels even if those channels contain no content that is in the least objectionable.

But the validity of this economic argument is beside the point of my First Amendment analysis. The crucial focus, rather, is on *who decides* whether and when to unbundle—on *who chooses* whether to link Content A with Content B in the marketplace of ideas, information, and expression. It is not simply the fact that unbundling might reduce the quantity and diversity of speech that puts mandatory unbundling on a collision course with the First Amendment. Even if, on balance, unbundling could be shown to increase that quantity and diversity, it is emphatically the *centralized governmental compulsion to unbundle* that the First Amendment forbids when, as here, there is no close fit to a compelling governmental objective. And this prohibition is underscored, not ameliorated, by the undeniable circumstance that this centralized determination is being driven in large part by a viewpoint-discriminatory and paternalistic concern with expressive content, rather than by content-neutral economic considerations, as in the case of the anti-tying prohibitions of the antitrust laws. The First Amendment does not tolerate such a legislated shift from individualized determination of proper expression. Any regulation of television content must recognize that our system of government rightfully places this determination in the hands of individual families and parents, not those of Big Brother.

IV. Appendix

The Ad Hoc Media Coalition Motion Picture Association of America, National Association of Broadcasters, National Cable & Telecommunications Association, ABC, Inc., CBS Corporation, Fox Entertainment Group, NBC Universal, Inc./NBC Telemundo License Co.

Senator ROCKEFELLER. Thank you, Mr. Tribe.

It’s interesting, because I’ve heard these comments so often, for so many years, “Let’s figure out a way to do this fairly, let’s get the industry cooperating, let’s”—I, myself, thought that Jack Valenti’s \$250 million advertising program was a gigantic joke, because it does nothing, it means nothing. Mailings to parents mean nothing. If parents don’t have V-Chip equipment on their pre-2000 television set, it means nothing. If parents do have that, but, themselves, are watching the program, because they choose to, and their children are watching with them, all of this means nothing.

So, to me, as always, the question is, if you simply find a way to cause the media to not put this content on, to the extent that they do, that solves the problem, solves all of the problem. But they won't do that, because they can't do that, because they have sweeps, they've got to make money, they're in desperate competition, there are too many of them in the first place, you know, one almost doesn't watch television anymore, because there is such a proliferation.

In any event, I do think that there is a solution for this, and I do think that just saying, "We've got to teach the parents how to do better," is a real cop-out. I don't argue that it's very—it's extremely important. I'm just saying that there are many, many parents who don't do that, or who do have double jobs, who don't get home on time, and—so that the tenor of most of this has been we've been through this for a very long time now, without any improvement.

And I'll just say, for the entire panel, excluding you, Mr. Tribe, what you said, Mr. McIntyre, and that is the U.S. Surgeon General—I guess it was you, Dr. Kunkel—or, I guess it was you, Mr. Winter—the American Academy of Pediatrics, the American Psychological Association, and the American Medical Association, virtually every other leading medical scientific organization that has studied this issue have reached the same conclusion about the harmful impact of media violence on our children. Is there anyone on the panel who disagrees with this conclusion, that excessive and graphic violence is harmful to children?

I'm asking for a yes-or-no answer.

Mr. LIGUORI. Sir, the research, again, as the Government has—

Senator ROCKEFELLER. I'm asking for a yes-or-no answer.

Mr. LIGUORI. No.

Senator ROCKEFELLER. Others?

[No response.]

Senator ROCKEFELLER. All right. I believe the entertainment industry could change what we watch on television, but it chooses to—this is a general question for the panel—chooses to sell sex and violence instead. I reject the notion that television merely reflects our society, the appetites that Senator Lautenberg was referring to, but, rather, I believe that television can and should be something of a positive force—a productive force. If television merely reflects society, it would appear that our own society consists of nothing but sexually promiscuous 20-year-olds and serial killers. I know that this statement is an exaggeration, but it's not far off from the overwhelming majority of prime-time shows, in my view.

So, my question is, does anyone wish to comment on this statement? I would like to understand the process that networks and other content producers use to determine what goes on the air, and why more family oriented programming is not given a chance to build an audience.

I guess that would go to you, wouldn't it?

Mr. LIGUORI. Yes, it would.

First of all, let's discuss the process by which programming reaches our air. We, at FOX—and so do my other network heads—have broadcast standards departments. Again, when a show is sub-

mitted, we, at the initiation of that show, from script to shooting script to rough cut to revision to final version, put those shows through our broadcast standards systems. Those broadcast standards look both at what the industry is doing, as well as our own internal standards. From that point, what we do is rate that show and make sure that that rating is in place for parents to decide what is appropriate and not appropriate for their homes.

Second, beyond the *prima facie* rating of TV-G, TV-PG, TV-14, we also look to have descriptors, which further a parent's understanding as to why that show is rated. Now, we in the industry are taking a—yet another look at how to create more consistency of those descriptors and enrich those descriptors. We, at FOX, tend to be fairly generous with it.

When you have a show like “24”—which, again, we want to absolutely make sure parents know what type of programming they're going to get—we start that show off with a 4-second full-screen advisory, our star reads that advisory, it's followed by a 15-second bug, and then, coming out of each commercial break, we put that ratings bug up again. So, again, there is a system, and there is information that—we make sure they both are in place so parents can make an informed decision as to what shows are appropriate for their family.

Senator ROCKEFELLER. My time is up.
Vice Chairman Stevens?

Senator STEVENS. Well, thank you very much, Mr. Chairman.

You know, Mr. Winter, I've met Mr. Spielberg, and I appreciate what you said, but we have to keep in mind that the “Band of Brothers” was banned from being shown on television. I think there are—sometimes people go to extremes. I certainly believe that a historical movie such as that is something that young children should see, but, beyond that—

Mr. Tribe, where do we go, have you heard, and I'm sure you know, that the tremendous pressures that we all feel about this subject of trying to provide protection. We've tried to do it from a point of view of the time of day. We had a—“8 o'clock in the morning until 9 o'clock at night” concept that we were looking at, in terms of content, and having other content be more permissible after 9 p.m. Does that cross the lines of constitutionality, to you?

Mr. TRIBE. I'm afraid it does, Senator Stevens. It just means, first of all, that there is an absolute ban, except during a certain time. That is, time channeling that provides a safe harbor doesn't solve the problem of vagueness, it doesn't solve the problem of viewpoint discrimination, it doesn't solve the problem that, at other times, adults are being reduced to what is appropriate for children, it doesn't solve the problem that the Supreme Court will strike it down, because it has said that segregating indecent sexual programming to a certain time is a kind of absolute ban on one slice of time. So, although time channeling is tempting, it's only voluntary, industry-based, parent-organization-based or nongovernmental-organization-based solutions that are going to pass muster.

Senator STEVENS. Well, if that one scene, where that policeman was having the act performed from—was done on the corner of Fifth Avenue in New York, that could be punished for being a lewd and lascivious act in public, right?

Mr. TRIBE. Well, in fact, that scene was probably “obscene” by the Supreme Court’s standards. But that is a very different regime of applicable law. Under decisions like *Miller v. California and Paris Adult Theatre*, obscene, explicit, graphic depictions of sexual acts that are patently offensive and lack any serious scientific or literary merit are unprotected speech. But ever since 1948, the Supreme Court has made clear that violence and obscenity are very different. Violence—of the sort that we see every night in coverage about the war in Iraq—is pervasive in public display and literature throughout history, and the attempt to use the violent element, as opposed to the sexual element, as a basis for either prohibition or time channeling or segregation onto particular slices of the spectrum or particular channels is just not going to wash with the Supreme Court.

Senator STEVENS. Well, is there—is it possible at all to draw a constitutionally safe line, in terms of what we’re dealing with here today?

Mr. TRIBE. I think, in terms of defining “violence,” there is no safe line that can be drawn, other than empowering parents.

Senator STEVENS. Well, could we—

Mr. TRIBE. I don’t think it’s a coincidence—

Senator STEVENS.—could we empower parents to have a special suit against any entity that displayed something like that, that we saw? That is—that is within the Supreme Court’s definition of really “obscene” and “lewd and lascivious.” Can’t—could we give parents more protection by individual right of action against them?

Mr. TRIBE. If it’s obscene by the Court’s definition, and not protected speech, you could certainly give parents the right to sue.

Senator STEVENS. Is that protected speech?

Mr. TRIBE. I think, probably not.

Senator STEVENS. Yes, so do I.

Mr. TRIBE. But an awful lot of grotesque, violent stuff is not obscene or sexual, and it’s something that we can try to protect our kids from and that we can encourage people not to produce. Senator Rockefeller, before he left, said, “This whole problem could just be solved if we’d go to the source and we don’t produce it.” But, as you pointed out, Senator, when it’s pervasively produced throughout the world—available on the Internet, available to be downloaded on iPods, available in video games—the idea that we can simply wipe it out at the source is, I think, an illusion, and we fool ourselves if we don’t admit that the reason we’ve struggled with these problems for so long without making more than incremental headway is that they are fundamentally intractable to government resolution. These are problems of deficient and inadequate parenting, and I’m not talking about blaming parents, I’m talking about doing whatever we can to empower them.

When Senator Rockefeller says, “Well, some parents have televisions that were made before the year 2000, they don’t have the V-Chip,” well, that’s a self-limiting problem. It’s going to go away. It’s a diminishing percentage of—

Senator STEVENS. Well, my—

Mr. TRIBE.—televisions.

Senator STEVENS.—time’s up, Professor.

Let me just give you an example. I took my youngest daughter to a movie one Saturday afternoon, to see a Western movie that I thought would be perfectly acceptable. She sat there about 20 minutes and said, "Dad, I'm going home." Someone had called a woman in that show a whore, and she said, "I'm not going to listen to something like that." So, we got up and left. Now, I would say that came from her mother's influence, obviously, and it's the proper way to get the discipline into the young people, is through the influence of parents. Would you agree?

Mr. TRIBE. I agree, that's admirable parenting, Senator.

Senator STEVENS. Thank you.

Thank you.

[Laughter.]

Senator STEVENS. One parent was wrong, right?

[Laughter.]

Senator ROCKEFELLER. Senator Lautenberg?

Senator LAUTENBERG. Yes, turn back the clock, so we can have an even start, please. Thank you.

Mr. Winter, have there been any studies on the effect on children of violent news—the war—as opposed to violent entertainment? Are you aware of any?

Mr. WINTER. Not to my knowledge, Senator. I would have to defer to those scientists here on the panel.

Senator LAUTENBERG. Anybody—Dr. Kunkel?

Dr. KUNKEL. Yes, there certainly have, and they pose risks of harm from—children's exposure to those types of portrayals, as well.

Senator LAUTENBERG. How would we control—would it be suggested that we can control that kind of thing?

Dr. KUNKEL. I think it's a challenge to craft measures that address the type of concerns raised by—

Senator LAUTENBERG. So—

Dr. KUNKEL.—TV violence. But I must say—

Senator LAUTENBERG. OK.

Dr. KUNKEL.—that I'm troubled—in Professor Tribe's statement, you are—

Senator LAUTENBERG. Well—

Dr. KUNKEL.—you receive one perspective, and that is the legal challenges that are posed in crafting a—

Senator LAUTENBERG. Well, we're—

Dr. KUNKEL.—regulatory solution.

Senator LAUTENBERG. You're getting me into a discussion that you may want to have with Dr. Tribe when you have a moment.

Dr. KUNKEL. It's a central issue—

Senator LAUTENBERG. He's a—

Dr. KUNKEL.—for this Committee—

Senator LAUTENBERG.—distinguished—

Dr. KUNKEL.—to confront the harm—

Senator LAUTENBERG.—legal scholar, and I sometimes call him for advice, not related to this subject, but constitutional matters, and I appreciate—

Let me ask you this, any one of you. Is wrestling considered tea and crumpets in our society, or is wrestling a form of violent exercise that attracts more and more and more audiences all the time?

I was more of a sports fan in an earlier life than I am now, but when they took the gloves off hockey, hockey became a more popular sport. And we see evidence of violence, even in this place. Even in this place. If you check the language, the vituperation and so forth, it is a form of violence. How about violence in the homes? Do you know, I wrote a law that banned spousal abusers from getting gun permits. I had to sneak it through on a piece of must-carry legislation. It wouldn't have stood there on its own. 150,000 permits have been denied since 1996, when I wrote that law. Now, we know very well that the incidence of murder and harm is much greater in a house where there is a gun available. And yet, the NRA controls so much of the thinking that we go through in this House—we can't pass sensible gun legislation, because we dishonor those, purportedly under the Second Amendment. And so, honestly, my friends, if I look a little enraged, I hate that kind of stuff that we just saw, that evil stuff, that viewing. And I don't want my grandchildren to be subjected to that, and I don't want anybody's grandchildren to be subjected to that stuff.

But don't we, in a way, in—the way we conduct things, set an example that isn't true at all, and increases, I think, violent attitudes between one another? We took away a mentoring program that I had introduced. It was so good. An hour or two a week, at the most, mentor a child, talk to him, pat him on the head, say it's good—it leads to remarkable behavioral changes. And it was done away with due to—budget reductions.

So, when I asked, What can we do? Is there a constitutional way to regulate violent entertainment while protecting the independence of news organizations? Dr. Tribe, is there any way that you can think of that would do that?

Mr. TRIBE. Senator Lautenberg, I hate repeating myself. The only way that I know, under the Constitution, is to look at what it is that prevents kids from getting better supervision by their parents, which is not necessarily a national responsibility, but often a State and local one, and often a matter of an inadequate economic base. If you asked me whether I believe that funding some program for patting a little kid on the head will do more good in the long run in terms of violence than grandstanding on this subject or more good than passing a law that then is struck down so you can point at the courts and say it's their fault, then yes, I think it would do more good to spend a little money on programs that are designed to substitute when the kid doesn't have good parenting at home.

Senator LAUTENBERG. It's amazing how neglectful parents are when they're poverty stricken and out to try and get a job, so that they can't sit and regulate the programs, or supervise the programs that their children are watching.

Mr. Chairman, thanks for conducting this hearing.

Senator ROCKEFELLER. Thank you, Senator Lautenberg.

Senator Klobuchar?

Senator KLOBUCHAR. Thank you very much, Mr. Chairman.

Thank you, witnesses.

Mr. Liguori, you talked about your TV rating system, that there are proposals that you're considering, to make it better. Could you discuss those?

Mr. LIGUORI. Yes, I can. And I actually thank Mr. Winter for actually citing an example of where the industry needs to do better; namely, I think it was the “NCIS” show that failed to have the rating. Look, it does seem fairly obvious that that was a pretty good example of a show that required a V rating. Again, the goal of the rating is twofold. One, very simply, on its face, if one were to see a TV-G, TV-PG, TV-7 or TV-14, that they should immediately—a parent should immediately know that that may not be appropriate programming for their child. And, when one programs their V-Chip or their cable or satellite controls, those ratings are, in fact, easy to set your TV to.

The second level is descriptors. We should have a—as consistent as possible, given the difficulties in defining “violence”—but, nonetheless,—in a preventative measure, it is a little easier to say, “Yes, this show has a depiction of violence or sexual content or, potentially, aggressive dialogue or language.” And those descriptors would be attached to that rating, so, in fact, there is an explanation.

It also serves as a second filter for parents to block. You could block one of two ways. You could block via ratings, or you could block via descriptors. And so, again, it serves not only as an informational tool, but as a blocking tool, so that parents could deem what is and isn’t appropriate for their particular family.

Senator KLOBUCHAR. You know, Senator Rockefeller was asking about the ad campaign, the PSA campaign, and I think I saw some polls showing it hadn’t really increased V-Chip use. Do you dispute that? And can you think of other ways to—

Mr. LIGUORI. Well—

Senator KLOBUCHAR.—change this?

Mr. LIGUORI.—this is—this is where we’re at with the ad campaign. Currently, we’ve spent about \$146 million of the \$300 million that Mr. Valenti raised. A couple of key facts. First, there is 77 percent awareness of this—of these PSAs. And, just by way of example, when we, at FOX, and some of the—of our other networks, were to look at awareness of a PSA—typically awareness of a PSA is anywhere between 50 and 55 percent—the Ad Council would agree that 77 percent is astounding—really effective awareness of the campaign.

Now, there are some preliminary results that show that the campaign is beginning to take effect. Early indications show that parents have gone from a benchmark of 79 percent saying they have a lot of control over their kids’ use of TV, to almost 85 percent. When you look at total control, it’s gone up from about 25 percent to about 30 percent. So, in fact, the campaign, which is just about halfway through, is, in fact, starting to take root.

Senator KLOBUCHAR. Was there some Zogby poll—maybe I’ll ask Mr. Winter to comment, though—that just showed—and I want this to work, and, obviously, I think the other issue, of course, is, there are some parents that are just not going to be able to have the time to deal with all this technology, and I hope we can find ways to do it more simply. But I think there was some poll that just showed it had gone up 1 percent, or something like that.

Mr. WINTER. Yes, Senator, it did not move outside of the margin of error of the study, over the course of several months—actually, 9 months.

Senator KLOBUCHAR. So, are you hopeful that, when the campaign gets completed, we'll see a change? I'm just looking at ways for the parents that aren't going to be able to do this and have the time and resources to figure it out—this is to Mr. Liguori—that we're going to see better increases in the use of the V-Chip. But then, for these other parents, that I saw a lot when I was a prosecutor, who were just in poverty, it was difficult for them, their kids were home alone after school, they didn't have the resources—just what we're going to do to try to protect those kids is what I'm looking at, and I'm trying to find something that's constitutional, but that also is—and maybe with some new technology. And that's what I want to hear about some ideas here.

Anything more you have, Mr. Liguori? I have 36 seconds left.

Mr. LIGUORI. Well, first of all, I share your hope. And, second, again, further education is probably the single best step that we can take here. We want to continually make sure that parents have aware—are aware of the controls that are available to them.

And, look, I also think, partly, we should be applauding some parents here. There are many, many parents who are monitoring their kids' TV use. Seventy-three percent of parents monitor their kids' TV use, 84 percent of parents with kids under 10 monitor their children's TV use. It's not 100 percent. My goal would be to get it to be 100 percent. But I don't think we can discount the most widely used and effective method available: parents themselves.

Senator KLOBUCHAR. Thank you.

Senator ROCKEFELLER. Senator Dorgan?

**STATEMENT OF HON. BYRON L. DORGAN,
U.S. SENATOR FROM NORTH DAKOTA**

Senator DORGAN. Mr. Chairman, thank you very much.

Mr. Tribe, I, frankly, wasn't pleased with the implication of your suggesting that what this Committee is doing is, quote, "grandstanding." Senator Rockefeller has brought to this Committee, I think, a serious issue.

Let me read to you what I wrote 8 years ago, in 1999. Senator Hollings, myself, and others were engaged in this issue then. Since that time, this problem has gotten worse.

Let me quote what was in the letter. "We recognize parents bear the primary responsibility for monitoring their child's entertainment and television viewing, but television executives must also bear some of the responsibility for the programs they produce and promote. We're not asking them to replace parents, but, rather, to help parents, to make their job a bit easier by reducing the amount of violence, sex, and language in television shows." We suggested the reinstating of the family hour, which you have talked about.

You know, look, in this country, there is no accounting for bad taste. I turn on television, don't leave it on long, when I see someone eating a bowl of maggots in some reality television show, apparently for entertainment purposes. I don't suggest that we prohibit someone from eating maggots on television. I just think that's

bad taste. But people have a right to do that, I guess, and a right to film it and show it.

But I think a consensus with respect to this issue that we're discussing today is the following, that the menu of sex and violence on television is harming children. That was the consensus of this panel, except for one person. And, second, it is not only harming children, it is increasing. And, with respect to Mr. Tribe's position, there is nothing we can do about it, or at least little we can do about it, except to say to parents, "We hope you'll do a better job."

Now, I don't quite understand the circumstance here. The airwaves over which the television programs are broadcast belong, not to Big Brother, Mr. Tribe, but to the American people. And your reference to Big Brother, I suspect, is that instrument the American people control, called "We, the people"—it's the Federal Government. The airwaves belong to the American people. The conditions under which those airwaves are used by people to whom we license those airwaves, seems to me, is a perfectly appropriate thing for us to discuss. I'm not a big fan of censorship at all. I think it moves in the wrong direction. But I do think that we ought to think seriously about, what are the conditions that attach to licensing the airwaves for free use by broadcasters? Should there be a period of time in which you can expect the television menu presented in that home living room, when children are present, would have material that is appropriate for that? I think it's perfectly appropriate for us to be considering that. It is not grandstanding. It's been going on in this Committee for about 10 to 15 years, with virtually no progress. And I commend my colleague for raising it once again, because I think this is a serious issue.

I might just make one other observation. My understanding was, the last time we discussed this, when *Teenage Mutant Ninja Turtles* was a very popular program in this country, it was filmed two separate ways. *Teenage Mutant Ninja Turtles* was filmed, for American viewing audiences, with all of the blows and all of the swinging of clubs and whatever they did, and then it was filmed a second way, with most of that, or much of that, excised, with a much less violent content to it, because that's what was required for it to be aired in Europe, particularly Great Britain.

So, you know, my point—I've not asked questions here, but I've listened attentively, I've read all of the statements. I think this is a constructive panel. I think it's an important subject. I don't think it is easy to solve.

Mr. Tribe, I have long, long, long respected you and all of the work you do with respect to the First Amendment, but you will, I hope, understand my concern about an implication of this Committee grandstanding when we deal with an issue of this importance, an issue in which all of us—almost all of us agree is harming children, and one in which we wish we could find a way, and we hope to continue to search for a way, to ask those who portray this material on television to be thoughtful, rather than thoughtless.

Now, Mr. Tribe, I'll give you a chance to respond.

Mr. TRIBE. Thank you, Senator.

First of all, I would certainly apologize if I was understood to be saying that this Committee is grandstanding. This Committee is

treating this issue with utmost seriousness, and I respect it for doing that.

What I'm concerned about is a lot of people who are in favor of doing something whether it survives in the court or not, and who, unlike this Committee, are not going to dig seriously into the merits and into the constitutional issues, and who are therefore not doing their job, in the way that this Committee is doing it.

As far as Big Brother is concerned, I certainly agree that the public airwaves are a public resource, and that licensing the public airwaves through the FCC is an important process, but it's not a process that gives license to the Government to engage in the censorship that I think you and I both agree is dangerous.

If we were to engage in censoring the free, over-the-air broadcast system without a similar program for dealing with newspapers, video games, and cable, we would be touching so small a part of the problem that we would really be making a symbolic gesture that wouldn't affect the large flow of material that our children see.

Senator DORGAN. Mr. Tribe, let me ask you a question. What if, tomorrow, there were a public hanging in this country that had been through the court system and a defendant was ordered hanged, and it was all right for that jurisdiction for it to be televised? And do you suspect that we would have a rush of those who wished to televise it? And do you think it would capture a large audience? And do you think it would be appropriate?

Mr. TRIBE. It certainly wouldn't be appropriate. I hope it wouldn't capture a large audience. But I have asked a final exam question on whether, under current law, it would be permissible to black it out, and I don't really know what the answer is.

Senator DORGAN. Would free speech—

Mr. TRIBE. It would be implicated.

Senator DORGAN. Would—

Mr. TRIBE. But I don't know the answer to your question.

Senator DORGAN. If this country decided, "You know what, we don't want to televise hangings," would that be censorship?

Mr. TRIBE. Well, if the country decided to prevent the distribution of pictures of Saddam Hussein's hanging, I suppose it would be a form of censorship. It's a hard question.

Senator DORGAN. You understand why I'm asking the question. The Federal Communications Commission and the Congress have some circumstances under which we can establish conditioning of licenses over which the airwaves—

Mr. TRIBE. Right. But if *The New York Times* chose to—

Senator ROCKEFELLER. I have to—

Mr. TRIBE.—run the picture on the front page—

Senator ROCKEFELLER.—interrupt, at this point. Senator Dorgan, your time is gone over, and Senator Thune has yet to speak.

Senator DORGAN. Mr. Chairman, you're absolutely right I was doing such a great job of—

Senator ROCKEFELLER. You were.

Senator DORGAN.—defending your position, I thought—

Senator ROCKEFELLER. You were.

Senator DORGAN.—you would want me to go on.

[Laughter.]

Senator ROCKEFELLER. I'm trying to be fair.

Senator Thune?

**STATEMENT OF HON. JOHN THUNE,
U.S. SENATOR FROM SOUTH DAKOTA**

Senator THUNE. I was just entertained listening, Mr. Chairman, so—

Mr. Chairman, thank you for holding this hearing.

And I want to thank the witnesses for taking time out of your schedules to share your thoughts with us on the issue of violence in the media.

I remember—it was sort of self-regulating when I was growing up in western South Dakota. We got one TV station. We got the CBS network affiliate. And so, “Gunsmoke,” “The Wild, Wild West,” were the shows that we watched—and “Bob Newhart,” and the edgier ones, like “M*A*S*H”—at that time was considered edgy—or “Hawaii 5-0,” which, at that time, we thought was a little on the edge, in terms of violence, and now, you look back on it, and it looks like child’s play compared to what we’re dealing with today. And it almost seems like, since that time, there has kind of been a race to the bottom, in terms of what’s acceptable and the kind of content that we’re exposed to today, and the coarsening that’s occurred in our culture.

According to the Kaiser Family Foundation, 81 percent of children ages 2 through 7 sometimes watch television without adult supervision, 91 percent of children ages 4 through 6 have turned on the television by themselves. And I guess my question is, where are the parents in this equation? Because I wholeheartedly agree with those who say that there is way too much that comes across the airwaves that is too violent for the eyes and minds of our children, yet I also come back to the basic premise that there is no substitute for a responsible parent.

And, I guess, as we enter into this debate and try and determine how best to address, and whether or not there is a role for the Government to regulate this sort of thing, and how it fits within the framework of the First Amendment, these are all challenging and complex questions, and I appreciate some of the light that’s been shed on those questions today.

I would like to ask—pose a question of Mr. Tribe, and pick up on some of the line of questioning that you’ve responded to already. But Congress asked the FCC to look into the issue of media violence, and, at that time, my understanding was that one of the duties they tasked the FCC with was to come up with a definition of “violence” that would pass constitutional muster. In the recent April FCC report on violence, the FCC basically pushed that task back to the Congress. What is the likelihood of FCC or Congress coming up with a definition of “violence,” for regulatory purposes, that survives in the courts? And, second, how much different would this definition have to be than the definitions television content providers are using in the current television rating system?

Mr. TRIBE. Senator, I don’t think it’s likely that a collective body like Congress can do a better job than the FCC when it was tasked by Congress to come up with proposed definitions of violence. So, although it may seem like a kind of pingpong match, I think that one possibility is to ask the FCC to do what it claimed it thought

was doable, but just didn't want to try doing. It said, "We know it's difficult to come up with a definition, but we think it can be done." And I think there is nothing like demonstrating that it can be done to satisfy the curiosity of those of you who think there may be a constitutional definition.

So far, I have to say, every definition that I've seen is subject to several attacks, all of which, I think, are likely to succeed in the courts. First, every definition I've seen is still too vague for ordinary people to understand what it means, what it covers, and what it doesn't cover. Does it cover a certain scene from "24"? Does it cover the landing scenes in "Saving Private Ryan"? Second, every definition is over broad, in that it's going to encompass a great many things that are not hardcore enough to pass muster with the Supreme Court. Third every definition has internal inconsistencies. We hear that the more sanitized and the more trivialized a depiction of violence is—so that kids don't know how harmful violence can be—the more it's likely to get imitated. On the other hand, if you make these depictions really gruesomely realistic, children are going to have nightmares, and that causes another set of problems, sort of frightening our kids to death.

And so exceptions get made, or the definition is like Swiss cheese, or we exempt news—like the coverage of a public hanging, if it happens to be news—and we exempt wrestling and violent sports. And once we exempt it all, then our kids are going to see violence anyway, and we're not going to make much of a dent. And the Supreme Court has said that, when you're dealing with speech, you've got to prove that you're going to make a real dent in the problem in order for it to pass muster.

So based on any definition I've seen, I honestly think the likelihood of solving the constitutional problem through the route of centralized government control is extremely low. But at least the FCC could try to come up with something that you could look at and test, rather than this abstraction of saying, "It's difficult, but you guys try."

Senator ROCKEFELLER. Senator—

Senator THUNE. Yes, sorry. My time up?

Senator ROCKEFELLER. Your—it is.

Senator THUNE. All right. Thank you, Mr. Chairman. Then, I would thank, again, the panel for their testimony.

Senator ROCKEFELLER. Senator Thune, if you want to ask another question, go ahead.

Senator THUNE. Well, I was just going to ask a question, if I could, for Mr. Winter.

And this is sort of a broad question, and I don't—I'd—in the interest of time—but, how would you improve the current rating system and its application, if you could do that?

Mr. WINTER. Thank you, Senator, for the question.

The inherent problem today with the rating system is that those who are tasked with its success are actually financially motivated for its failure.

The conversation here today has centered on something that I think is inaccurate. The viewer is not the consumer. The viewer is the product. The network sells the viewer's eyeballs to an adver-

tiser. The advertiser is truly the consumer when it comes to broadcast television, sir.

Anything that could possibly limit the number of people who are watching a show at any one point in time limits the amount of revenue that the broadcast network can earn. I spent most of my career, Senator, in the broadcast industry. It is a wonderful industry. But when you have clearly, here, an example of the fox guarding the henhouse, the rating system, as it's currently structured, cannot work. We did a study, this last April, that found, between 60 and 80 percent of the time, the ratings are wrong. Their language descriptors, the violence descriptors that I mentioned earlier, are inaccurate. We believe they're inaccurate because there is financial motivation, by those who are rating their own programs, to under-rate them. It prevents a viewer from turning it off, and it prevents an advertiser, who may be mindful of what a program rating is before they sponsor it, to steer away.

I believe that there needs to be an independent rating system. I believe it needs to be transparent. The stuff that we saw here on this monitor this morning may be rated TV-14. It may have a V descriptor. But what we saw here is not made clear to a parent, with a little V on the box that comes out of a TV commercial. I believe there needs to be a universal rating system. Parents are supposed to understand what a rating system is when they go to a movie, versus when they turn on the television, versus when they turn on the Internet, versus when they buy a video game, versus when they buy a music CD.

And I believe, Senator, there should be a consequence for inaccurately rating a program. Currently, there is no consequence whatsoever for—either intentionally or accidentally—inaccurately rating a program.

Senator THUNE. Thank you.

Thank you, Mr. Chairman.

Senator ROCKEFELLER. No, thank you very much, Senator Thune.

I'm going to ask to be entered into the record a statement of Professor Kevin W. Saunders, Ph.D., Michigan State University College of Law, to the U.S. Senate Committee on Commerce, on June 26, 2007.

And I, again, want to treat Mr. Tribe with respect but when I said "consultant to," I deliberately left out the word "paid," and I'm now going to read it—I'm going to insert that word, because you said, "I'm speaking from my heart," but you are being paid, by cable, network, and movies, to be here. And you're not an officer of the Cabinet, so that you're not being censored by OMB, you're not being told what can be said. But that needs to be on the record. And, for that reason, I want this and do say it without dissent, that an view of another law professor will be placed in the record.

[The information previously referred to follows:]

PREPARED STATEMENT OF PROFESSOR KEVIN W. SAUNDERS, J.D., PH.D.,
MICHIGAN STATE UNIVERSITY COLLEGE OF LAW

I want to thank the Committee for this opportunity to share my thoughts on the protection of children from violent television programming. I am Senior Associate Dean for Academic Affairs and Professor of Law at Michigan State University College of Law, where I specialize in constitutional law and in particular the First Amendment. I have spent the past dozen years studying the constitutional issues

surrounding attempts to limit the access of children to depictions of violence and to other negative media influences. I am the author of two books addressing the topic, *Violence as Obscenity: Limiting the Media's First Amendment Protection*¹ and *Saving Our Children from the First Amendment*,² and numerous law review articles.

I will discuss the issue in the context of the Federal Communications Commission's April, 2007 Report.³ The Report first recognizes the impact of violent media on children, and recognizes that despite criticism from media groups and a small number of scientists, the scientific and health community has concluded that there is a negative impact. This sort of evidence has not yet convinced courts that a complete ban on children's access to violent video games is justified, with the courts often demonstrating a skepticism regarding, or an inability to understand, statistical studies. In the context of the broadcast media, the test may be less stringent. As the FCC notes in its Report, the Supreme Court has stated a test for broadcast regulation that seems somewhat short of the strictest scrutiny. In *FCC v. League of Women Voters* the Court said regarding television "restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues."⁴ Thus, scientific results found insufficient in one context might be seen as sufficient in the arena of the broadcast media.⁵

Rather than take that approach, I will discuss the recommendations that violent programming be channeled into hours when children are less likely to be in the audience in comparison to the FCC's limitations on sexual indecency. The foundational case in this area is *FCC v. Pacifica Foundation*,⁶ which grew out of an afternoon broadcast of humorist George Carlin's "Filthy Words" monologue, words Carlin said you could never, ever say on the air. The FCC took the position not that the words could never be said but that they could only be used in hours when children are less likely to be listening. The Supreme Court found statutory authority to require this channeling of indecent material and also found no violation of the First Amendment. The broadcast media were seen to enjoy lesser First Amendment protection than other media, because of the pervasive presence of the broadcast media, the fact that the broadcast media confront us in our homes and not just in public, and the accessibility of broadcasts to youth, even to children too young to read. Warnings were seen as inadequate for those who tuned in after they were broadcast, and turning off the broadcast after hearing the indecent material was said not to be an adequate remedy. The only solution was channeling. In a series of cases, the United States Court of Appeals for the District of Columbia Circuit eventually established limits that channel indecency into the period of 10 p.m. to 6 a.m.⁷

The major issue raised by an attempt to protect children from the broadcast of violent programming is whether *Pacifica* addresses only sexual indecency or may apply to violence as well. The language of the statute at issue in *Pacifica* may be broad enough to include violence. The statutory prohibition was against the broadcast of "indecent" material. While *Pacifica* Foundation maintained that "indecent" meant "obscene," the Court said that "indecent" meant not in conformance with "accepted standards of morality."⁸ Under such a broad reading, indecency can include violence, at least if the material does not conform to generally accepted standards of morality. In any case, legislation authorizing the FCC similarly to limit violence would resolve any statutory issue.

In addition to the statutory concerns growing out of *Pacifica*, there is the important issue of whether the First Amendment analysis that justified the decision there carries over to violence. The pervasiveness, presence in the home and accessibility to children that spoke in favor of limiting sexual indecency are of equal concern when the material is violent. The argument that *Pacifica* can not carry over to violence finds its best statement in an article by Professors Krattenmaker and Powe published shortly after the *Pacifica* decision.⁹ They concluded that *Pacifica* must be limited to sexual material. They examined the decision against a background of Supreme Court cases regarding the First Amendment rights of children and concluded that, unless the Court was implicitly overruling several of those decisions, the indecency the First Amendment allows the FCC to regulate must be conceptually related to obscenity. For them the material subject to channeling must have the character of obscene material without necessarily reaching the level of explicitness and offensiveness needed to be legally obscene. Thus, in their view, *Pacifica* is limited to sexual material.

There are two responses to Krattenmaker's and Powe's argument. The first is to conclude that, while the Court may not have intended to overrule the decisions Krattenmaker and Powe cite at the time of *Pacifica*, the strength of those decisions has lessened to the point that *Pacifica* can now apply to violence. The major case recognizing First Amendment rights in children, and one heavily relied on in the article, is *Tinker v. Des Moines Independent Community School District*.¹⁰ That case

did recognize that children have First Amendment rights and that those rights even apply, with certain limitations, in school. Krattenmaker and Powe saw *Tinker* as limiting the application of case law approving restrictions on the distribution of material to children to sexual material.¹¹

Tinker may no longer have the vitality it had at the time Krattenmaker and Powe wrote their article. While the Court upheld student, and hence child, speech rights in the political context of a Vietnam War protest there, in later cases the Court has allowed restrictions in the schools.¹² *Tinker* may be seen as a high point for the First Amendment rights of children, with any retreat by the Court weakening the argument offered by Krattenmaker and Powe. In *Saving Our Children from the First Amendment*, I argue that *Tinker* was actually about not allowing the schools to be used to skew a real debate in the adult community. One side in the Vietnam War debate could not be allowed to express its view while not allowing expression by the other. When it came to a nomination speech full of sexual innuendo in *Bethel School District v. Fraser*¹³ or what the principal saw as unsuitable articles on divorce and teenage pregnancy in *Hazelwood School Dist. v. Kuhlmeier*,¹⁴ children's rights did not prevail. To the degree that the combination of plurality, concurring and dissenting opinions in *Island Trees Union Free School Dist. v. Pico*¹⁵ provide guidance, that guidance again focuses on political skewing in the choice of books to be removed from the school library.

If *Tinker* has eroded or is limited as suggested above, the argument that *Pacifica* is limited to material that approaches being obscene is weakened. Even if Krattenmaker and Powe were correct at the time of their article, it may now be constitutional to limit the access of minors to violence by requiring the channeling of broadcast violence. The discussion of the *Tinker* line of cases is only one part of *Saving Our Children from the First Amendment*, and the entirety of the book's argument speaks to the issue before the Committee. The thesis of the book is that there should be a two tier First Amendment. The protection of expression between adults should be fully robust, perhaps more robust than it is at present. At the same time, adult expression rights do not include the right to express oneself to other people's children.

Free expression certainly has great value. It is essential to self-government. It also is a part of the protection of the individual's autonomy interests in choosing the sort of person he or she wants to be. There are, of course, also costs. The violence concern has already been discussed, but there are also concerns over racist or sexist expression and over the effects of advertising. On balance, the dangers of government interference in the political process and our beliefs regarding autonomy lead to the conclusion that adult to adult expression should be strongly protected.

The balance should be different for children. The costs when children are involved are greater. Children are still in the process of developing. Neuroscientists are learning that even teenagers are undergoing structural changes in the area of the brain that governs judgment and inhibition. Negative influences of media on children may then be far stronger than any negative effects experienced by adults.

The benefits of free expression are also lessened when the issue is the availability of expression to children. Children don't play the same active role in self-governance that adults do, so free expression for them is not crucial to the political system. Children will eventually need to be competent voters, and as they approach majority, they should have more access to information and must learn to participate in political debate. But, these training interests should not have the same dimensions as adult interests in free expression. There is also less commitment to autonomy for children; we simply do not assume them competent to make all their own life style decisions. We limit their access to cigarettes and alcohol, while allowing adults to decide for themselves whether or not to smoke or drink. Even the founding libertarian John Stuart Mill recognized that children are different. He gave as a reason why the state should not punish adult self-regarding behavior the fact that the state had all of the person's childhood to instill rules of proper behavior and should not punish those it failed to teach.¹⁶

If the First Amendment rights of children are weaker than those of adults, the government should have the right to limit their access to depictions of violence. Channeling of violent broadcasts would be an appropriate mechanism in furtherance of that interest. *Pacifica* recognized channeling as a proper balance of adult rights to hear the indecent material at issue there. If there is the same right to limit access to violence, the same balancing should allow channeling requirements for violence.

The particular relevance to this issue of *Violence as Obscenity: Limiting the Media's First Amendment Protection* is as a response to Krattenmaker and Powe, if they are correct in their conclusion that the indecency the FCC may require channeled must be related to the obscene. The thesis of that book is that the focus of

the obscenity exception to the First Amendment on sexual depictions is too narrow. It is the product of Victorian Age concerns over sex, and an analysis of the concept, a longer term view of the case law, and an examination of the policy arguments that justify the obscenity exception all speak just as well to violence as to sex. If violence, regardless of sexual content, may be obscene, lesser degrees of violence may be indecent, as the term is used in *Pacifica*, and may be channeled.

It is important to note that the Supreme Court has never stated that obscenity may not be based on violence, independently of sex. There is language in cases involving sexual material that says for such material to be obscene it must be erotic. But, in those cases the Court was concerned with distinguishing sexual depictions that are obscene from other sexual depictions or from the use of words that may have a sexual use in other contexts.¹⁷ The relevance of those cases to violence is minimal. The only Supreme Court case directly addressing the regulation of violence is *Winters v. New York*.¹⁸ There the Court found the statute at issue unconstitutionally vague but specifically warned against reading the result as a conclusion that violence could not be regulated under a properly drawn statute.

Turning to the ordinary language concept of the obscene, the extension of the word is clearly broader than sex, reaching even such uses as a corporation making "obscene profits." A reasonable limiting construction that still includes violence is found in a suggested derivation of the word from *ab scaena* or "off the stage," referring to material that cannot be shown on stage. Viewed from that perspective and over the long term, violence has as much claim to the label as sex. The classical Greek theater prohibited the depiction of homicide on stage.¹⁹ While a killing that occurred off stage could be described in great deal on stage and a person could die of natural causes or be struck down by the gods or commit suicide, homicide could not be shown on the stage. At the same time, there was a toleration of sexual dialogue and the on-stage portrayal of sexual excitement and nudity.²⁰ The theater of early Rome shared these Greek values, and while later Roman theater allowed violence to the degree of actual killings, it also allowed the actual performance of on-stage sexual acts.²¹ The relative treatment of sex and violence has varied from age to age. While the Middle Age mystery plays were quite violent, in some eras entertainment was very sexual, extending to animal and even human copulation for the entertainment of an audience.²² Historically, sex has no exclusive claim to the label "obscene."

Ordinary language analysis only takes us so far, and what is of real historical importance is the law's treatment of the obscene in constitutionally relevant eras. When the Supreme Court first recognized the obscenity exception it cited a long history of cases and statutes dating back to the constitutional era.²³ In that history it is important to note the lack of a focus on sex. In Professor Schauer's review of the history of obscenity law,²⁴ he concludes that in American law the sole focus of obscenity on sex did not develop until the 1986 Supreme Court decision in *Swearingen v. United States*.²⁵ This Victorian Era, post-14th Amendment focus is the product of a constitutionally irrelevant period. If the law in the constitutional era and 14th Amendment era left obscene material unprotected, as the Court concluded, it should be what was considered obscene in those eras, and not the more limited Victorian concept, that is denied First Amendment protection.

It is also interesting to note that the late 1800s limitation on the use of the word "obscene" was not accompanied by a change in the desire to regulate other depictions that would formerly have been labeled "obscene." The New York organization established by the anti-obscenity crusader Anthony Comstock also led the effort to prohibit the distribution of "any book, newspaper or other printed paper devoted to the publication, or principally made up of criminal news, police reports or accounts of criminal deeds or pictures and stories of deeds of bloodshed, lust or crime."²⁶ While this was the statute *Winters* held unconstitutionally vague, it does reflect a concern that was shared by a majority of the states in that era, as shown by nineteen nearly identical and four substantially similar statutes.²⁷ The history of denying protection to violent material is then, until the most recent era, as long as that for sexual material. If legal history justifies the obscenity exception, it justifies an exception that reaches violence as well as sex.

It is also important to examine briefly the policies offered as justification for the First Amendment and the obscenity exception. If the amendment protected only political speech or material advocating social change, the exception both with regard to sex and to violence would be justified, since material with serious value cannot be considered obscene. Professor Schauer's "Free Speech Principle" is broader but still requires communication, and he justifies placing the hardest core pornography in the obscenity exception because he says it is noncommunicative, is nonspeech, and is no more worthy of First Amendment protection than would be a mechanical sex aid.²⁸ His objection to protecting sexually obscene materials appears to be that

the brain is not their real audience. They have a visceral, rather than a cognitive or emotional, response. Music and romantic literature may stimulate, but they do so through the higher order functions of the brain. He views the brain as a superior audience to the genitals. The brain should also be considered a superior audience to the adrenals, and there seems to be no reason to prefer one portion of the endocrine system over the other. If depictions are violent enough to have a hormonal effect, Schauer's analysis would seem also to exclude them from the First Amendment's protection.

There are First Amendment theories that argue against the existence of the obscenity exception. But since the obscenity exception is a part of the law, the more interesting theories are those that justify it. Each of those theories also justifies an exception for violent obscenity.²⁹ Given the legal history, the ordinary language concept, and the inability to distinguish the two under First Amendment theory, the law should allow a refocusing of the obscenity exception to include violence. That recognition of violent obscenity should be accompanied by a further recognition that violent material may also be indecent. As such, it can come within the analysis of *Pacifica*, and the FCC may be authorized or directed to channel it into hours when children are less likely to be in the television audience.

It must be admitted that this obscenity argument has enjoyed only limited success since being offered in *Violence as Obscenity*. In a recent case growing out of an Indianapolis attempt to prevent minors from playing violent games in video arcades, the Federal district court, in *American Amusement Machine Ass'n v. Kendrick*,³⁰ used the theory in refusing to enjoin enforcement of the ordinance. However, when the District Court decision was appealed to the United States Court of Appeals for the Seventh Circuit, an opinion by Judge Posner rejected the inclusion of depictions of violence within the category of the obscene, concluding that the two are "distinct categories of objectionable depiction,"³¹ and other courts have followed Judge Posner. In Judge Posner's view, obscenity is restricted because the community finds it offensive, while there is not a similar offensiveness in violent material and restrictions are motivated by concern over dangerousness. It is, however, not at all clear that those concerned over sexually obscene materials are concerned solely out of some sense of offense. Furthermore, there would seem to be something flawed in a person or society offended by depictions of sexuality but failing to find any offense in explicit depictions of great violence. That is, however, not in fact our society.

A study that exposed a population in the Memphis, Tennessee area to sexual and to violent films and surveyed their reactions speaks to the issue.³² The sexual films were selected based on obscenity prosecutions indicating prosecutor beliefs that the films violated community standards for offensiveness, and the violent films were of the "slasher" variety. The participants were asked to assess the films both in terms of whether they found the films acceptable and also whether they thought the community found them acceptable. In summarizing the results, the study concludes that the adults found the sexual films not to be patently offensive, while the violent films were seen as exceeding their standards for offensiveness. What is particularly interesting is that, while the participants found the violent films offensive, they believed that others in the community tolerated the materials, while in another cited study the sample found the sexual materials not to be offensive but believed the community thought them to be offensive. If those results accurately represent the population, then the participants, and Judge Posner, must be wrong. People find violence offensive but think their community does not. But they are the community, or are representative of it, so the real situation is that the community in a sense finds violence offensive but thinks that it does not. That is, the average person finds the material offensive but believes himself or herself to be out of step with public sentiment. To the contrary with sexual material; the average person does not take offense but believes that other members of the community are offended. Judge Posner, whether he does or does not personally find violent depictions offensive, may have failed to recognize the degree to which the public does find such images offensive.

Turning, last, to the issue of requiring that cable systems allow a channel by channel selection of the programming that parents allow into their homes, there would seem to be little in the way of First Amendment concern. Such a rule would be in the realm of business regulation and protects the consumer from a form of product tying that requires buying cable services in packages or tiers. It is not content based. Some will refuse to buy channels perceived as conveying more violent fare, others will choose not to receive sports programming, and others will reject decorating and home improvement programming. All the FCC proposes doing is to allow the individual consumer to determine what comes into his or her home. The government offers no regulatory pronouncements as to what is suitable to what audience.

While the case arose in the context of limits on mailing commercial material to recipients who found the material objectionable, the Court in, *Rowan v. United States Post Office Dept.*,³³ offered insights that speak to this issue as well.

736 [T]he right of every person ‘to be let alone’ must be placed in the scales with the right of others to communicate. . . . Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer’s ⁷³⁷ right to communicate must stop at the mailbox of an unrecipients addressee. . . .

To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cutoff an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that ‘a man’s home is his castle’ into which ‘not even the king may enter’ has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another. . . .

We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even ‘good’ ideas on an unwilling recipient. That we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. . . . The asserted right of a mailer, we repeat, stops at the outer boundary of every person’s domain.³⁴

While cable television is not commercial in the same sense as mailed advertisements, the reasoning rings true. The right of the cable system to provide channels ends at the viewer’s cable box. So long as the government is not setting the limits, it may provide a mechanism by which the customer can.

Endnotes

¹Kevin W. Saunders, *VIOLENCE AS OBSCENITY: LIMITING THE MEDIA’S FIRST AMENDMENT PROTECTION* (Duke Univ. Press, 1996)

²Kevin W. Saunders, *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT* (New York Univ. Press, 2003).

³Federal Communications Commission, *In the Matter of Violent Television Programming And Its Impact On Children*, MB Docket No. 04–261 (April 6, 2007).

⁴468 U.S. 364, 380 (1984).

⁵There are stronger reasons to be concerned over violence than over sexual indecency on television. There appears to be little evidence of physical or psychological harm growing out of the exposure of youth to sexual indecency. This lack of evidence is probably due to ethical, and legal, concerns over exposing children to such material to study the effects. In contrast, there is strong evidence of negative physical and psychological effects from exposure to violent material. There is a vast body of research demonstrating a connection between media violence and real world violence. Six major professional organizations in the health fields have found the science conclusive. In a joint statement to a July, 2000 congressional public health summit, the American Psychological Association, the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Medical Association, the American Academy of Family Physicians, and the American Psychiatric Association concluded that “well over 1,000 studies . . . point overwhelmingly to a causal connection between media violence and aggressive behavior in some children.” American Academy of Pediatrics, *et al.*, *Joint Statement on the Impact of Entertainment Violence on Children, Statement to the Congressional Public Health Summit* (July 26, 2000), available at www.aap.org/advocacy/releases/jstmevc.htm. While the entertainment industry may dispute the connection, as tobacco executives continued to deny the connection between tobacco and lung cancer, the scientific community has come to a conclusion. That conclusion provides more justification for concern over exposing children to violence than for exposure to sexual indecency.

⁶438 U.S. 726 (1978).

⁷See *Action for Children’s Television v. Federal Communications Commission*, 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 116 S.Ct. 701 (1966).

⁸438 U.S. at 740. The Court cited WEBSTER'S THIRD NEW INT'L DICTIONARY (1996), which defined "indecent" as "altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: unseemly . . . not conforming to generally accepted standards or morality."

⁹See Thomas Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123 (1978).

¹⁰U.S. 503 (1969).

¹¹The case approving limits on distribution of sexually provocative material to minors was *Ginsberg v. New York*, 390 U.S. 629 (1968).

¹²See *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986). *Island Trees Union Free School Dist. v. Pico*, 457 U.S. 853 (1982), is often seen as a second case affirming the First Amendment rights of children in schools. But, the procedural issue in the case, simply whether or not there was an issue to take to trial and the lack of a majority opinion make it difficult to draw much guidance from the case.

¹³478 U.S. 675 (1986).

¹⁴484 U.S. 260 (1988).

¹⁵457 U.S. 853 (1982).

¹⁶See John Stuart Mill, ON LIBERTY ch. 4 (London, 1859)

¹⁷See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 n.10 (1975); *Cohen v. California*, 430 U.S. 15, 20 (1971).

¹⁸333 U.S. 507 (1948).

¹⁹See, e.g., Peter D. Arnott, AN INTRODUCTION TO THE GREEK THEATRE 22 (1959); Roy C. Flickinger, THE GREEK THEATER AND ITS DRAMA 130 (4th ed. 1936).

²⁰See, e.g., ARISTOPHANES, LYSISTRATA (Robert Henning Webb trans., 1963).

²¹See Richard C. Beacham, THE ROMAN THEATRE AND ITS AUDIENCE 136–37 (1991).

²²See Eberhard & Phyllis Kronhausen, PORNOGRAPHY AND THE LAW: THE PSYCHOLOGY OF EROTIC REALISM AND PORNOGRAPHY 66–67 (1964).

²³See *Roth v. California*, 354 U.S. 476, 482–83 (1957).

²⁴See Frederick F. Schauer, THE LAW OF OBSCENITY 7 (1976).

²⁵161 U.S. 446 (1986).

²⁶N.Y. Penal Law § 380 (1884).

²⁷See *Winters*, 333 U.S. at 522–23 (Frankfurter, J., dissenting).

²⁸See Frederick Schauer, FREE SPEECH: A PHILOSOPHICAL ENQUIRY ch. 12 (1982).

²⁹Other theories justifying the obscenity exception and their application to violence are discussed in Kevin W. Saunders, *supra* note 1, at 135–60.

³⁰115 F.Supp.2d 943 (S.D. Ind. 2000), *rev'd*, 244 F.3d 572 (7th Cir. 2001), *cert. den.*, 122 S.Ct.462 (2001).

³¹*American Amusement Machines Ass'n v. Kendrick*, 244 F.3d 572, 574 (7th Cir. 2001), *cert. den.*, 122 S.Ct. 462 (2001).

³²See Daniel Linz, Edward Donnerstein, Bradley J. Shafer, Kenneth C. Land, Patricia L. McCall & Arthur C. Graesser, *Discrepancies Between the Legal Code and Community Standards for Sex and Violence: An Empirical Challenge to Traditional Assumptions in Obscenity Law*, 29 LAW & SOC'Y REV. 127 (1995).

³³397 U.S. 728 (1970).

³⁴*Id.* at 736–38.

Senator ROCKEFELLER. This, to me, has been an interesting session—I'm going to come to you, Senator Klobuchar—interesting session, because it's exactly like all the other ones we've heard. All the questions have gone to Mr. Tribe, which I think, is predictable. The questions that have gone to you, Mr. Liguori, I could have answered the questions as you did, because I knew exactly what you were going to say, because that's what you've got to say. The people who deal—in a sense, this has almost wandered away from a hearing about children, you know, it's become sort of a discussion of American society. It is not. This is a hearing about the effect of violence and indecency, all the rest of it, on small children. And that's only what it's about. People have had a chance to talk about a lot of other things, among those being parental responsibility.

And, of course, I agree with parental responsibility, and what I think—and I think that Senator Klobuchar was thinking of some

of this. Our only daughter is a special-ed teacher, and she has been working in Jackie Robinson Junior High School, on 116th Street in New York, at a junior high school there, and—that’s a 100 percent nonwhite student body—and they did a very interesting thing, because a lot of the children were disruptive in class, and they wanted to know why. So, rather than punishing the student on the spot, they made each of the teachers, on a monthly basis for a period of at least a year, go to the homes of those individual students, where, for the most part, teachers found no parents, parents who were strung out on drugs, parents who were engaged in other activities, for the most part, parents who simply were not there. That’s a dramatic inner city example.

I don’t know if any of you gentlemen have ever been to West Virginia before, but one does not find an abundance of either broadband or many other things that are part of the larger urban world, especially in the rural parts of West Virginia. I was a VISTA volunteer there for 2 years. And, granted, that was some time ago, but the whole concept of a parent being able to enforce a V-Chip, had there been one at the time, is absolutely absurd. It’s absolutely absurd. Parents don’t take the time to do that, because parents are under unbelievable pressure in their lives. And often, parents are watching with the children, which brings in another dimension about parental responsibility.

I agree with parental responsibility, but unless you can show that parental responsibility works, then, it seems to me, we have to try something else.

Now, the answer here, roundly, with the exception of several of our witnesses, has been that there is nothing, really, we can do. And the difference between—what was it—causal effect and—whatever the other legal term was. And so, we immediately get lost into the world of, “What can we do?” There can be no answer that will pass muster in the Supreme Court, or in the courts.

And, see, that’s been the pattern. I was with Senator Dorgan, working on this, starting a dozen years ago, with Senator Hollings. And I continue working on it, and I’ll continue—I’ll keep on, for as long as I’m here. It’s a devastating problem. To point at parents, and to have the head of FOX—or whatever your position is, Mr. Liguori—to say that the problem is the parents, strikes me as an inordinately repulsive statement. You’re the one—and I think that, Mr. Winter, you’ve hit it on the nail—his audience is not the child, his audience is the advertiser. He’s got to sell the program to the advertiser to make sure that the advertiser puts up the money so he can put the program on. And I think that’s the history of television.

Television used to self-regulate quite well, up until about 1992, and then, all of a sudden it just went straight downhill, and it has stayed so.

And so, I will conclude my statement with the statement that Eddie Fritts, then head of the National Association of Broadcasters, said, 3 years ago: “The National Association of Broadcasters believes that voluntary industry initiatives are preferable to government regulation when dealing with the program issues, just releasing a number”—et cetera, et cetera, et cetera.

Well, of course that's what he's going to say. Of course that's what he's going to do—going to promulgate. Of course Jack Valenti's farcical \$250 million—which was not, incidentally, money, but it was just money taken away from television advertising, so it wasn't even a donation, which it was made out to be. It doesn't have any effect. Americans don't remember things for long periods of time, and they don't know technology well.

To me, the saddest part about what I think has been a very interesting hearing, but very frustrating, from my point of view, has been that the three people who have studied this from—in terms of Mr. Winter, Dr. Kunkel, Mr. McIntyre—who have studied this from the point of view of the effects, on children, of violence and indecency, has been relatively not discussed. You have discussed it. Others have not. The panel has relatively not discussed it.

That's what we're talking about. We're not talking about 30-year-olds or 60-year-olds or whether Senator Lautenberg is repulsed or not, or whether Senator Sununu thinks that putting something on at 10:35, which—at least it got our attention, that was the point of it—the point is, it's about little children, whose brains are entirely formed by the time they are 5 years old, and whose habits are clearly forming as they enter into their teen years. This is exactly what we're talking about, and only what we're talking about. So that the three people, I think, who know the most about that are the three people who received the fewest questions. And I think that is, in a sense, symbolic of the race for the bottom and the race for the dollar in our society.

Senator Klobuchar?

Senator KLOBUCHAR. Thank you, Senator Rockefeller.

And thank you, to our panelists.

I will say that I'm focused here on some of these kids whose parents might not have the resources to figure out the V-Chip. I'll tell you, in my own life, my husband and I have—our TV, the volume is so low, we can't get it higher, that we have to turn the air-conditioning off to watch it, and we don't have time to fix it yet. It's been like that for about a month. And I think about these other parents who have a lot less resources than us. So, I struggle here with trying to help these parents, and—who I think want to be responsible for their kids—to find the easiest way to do this.

And the answer, to me, is that we have to educate, as much as possible, and then we have to see if we can be creative about doing this in the right way, because I really don't want to pass something that we believe is going to be thrown out in court, just to do that.

And so, I'm, you know, looking at this à la carte option, which I think is problematic. I think you kind of squeeze one end of the water balloon, and then you have problems on the other end. I know there are concerns from the religious and minority broadcasters on this, and that's why I keep going back to push Mr. Liguori and the industry on the technological possibilities that we could put in place here to help parents; to make it easier when they order their systems or whether they know for sure there is a certain time band. And I know that this has been tried before, and found unconstitutional. But I just ask—this is my first hearing on this subject, I know there have been a lot of other ones in the past—but we are a smart country, we've been able to develop

things. We know that violence has this effect on kids. I've seen it, as a prosecutor. We'd always use the statistic—and I'd see it in the kids of offenders that would come through the system, that kids that grow up in a home where there is violence—I'm not, here, talking about TV violence, I'm talking about watching their own parents—are 76 times more likely to become offenders, themselves. That's a statistic that isn't about TV violence, but I've seen it in my own life, with the kids that we see.

So, anything that we can do—and I think we need to measure the effect of some of these things, which are of good merit—to allow parents to take more control, see if they're working, and then, if they're not working, to look at other ways that we can make it easier and easier for parents, especially those that are not of means, to try to limit what their kids watch.

So, I want to thank you for being here. We look forward to working with all of you.

Thank you very much.

Senator ROCKEFELLER. Thank you.

And I also thank you.

And this hearing is adjourned.

[Whereupon, at 12 p.m., the hearing was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. DANIEL K. INOUE, U.S. SENATOR FROM HAWAII

Television plays a formidable role in our lives. In the average American household, the television is on more than 8 hours a day. American children watch 28 hours of television programming each week. By the time most children begin the first grade, they will have spent what amounts to three school years in front of the television set.

Television programming can be a tool for enlightenment, education, and discovery. But television programming also can impart more troubling lessons. Too often, for children, these lessons are violent ones.

Based on decades of research, authorities such as the Surgeon General, the American Medical Association, the American Psychological Association, and the American Academy of Pediatrics have concluded that viewing television violence can lead to increases in aggressive attitudes, values, and behavior in children. More troubling, still, is that despite this conclusion, children today are exposed to more violence on television than ever before. In a survey of primetime programming, a recent study found that between 1998 and 2006, depictions of violence increased by 45 percent in the 8 p.m. "Family Hour."

Television is a powerful medium, and those who control its programming have powerful responsibilities. Given the problem of television violence and the harm that can come from children viewing this violence, I hope we can encourage parents, industry, and government to act together to lessen children's exposure to television violence.

I would like to thank Senator Rockefeller for his leadership on this issue. I look forward to the testimony from today's witnesses.

PREPARED STATEMENT OF HON. MARK PRYOR, U.S. SENATOR FROM ARKANSAS

Senator Rockefeller, thank you for requesting this important hearing.

Over the past decade there has been literally thousands of studies and reports on the impact of media content on children. The vast majority of these studies conclude that children are indeed vulnerable to the message conveyed in TV shows, movies, and games—and that the impact can be harmful.

I agree with these studies. I believe that television programming, music, and video games have a strong influence on children, including a child's perception of safe and reasonable behavior.

I believe that there is a compelling government interest to understand and protect children from manipulative and destructive content.

And, I believe that it is good business for business to develop content that is appropriate for kids.

I hope that this hearing will start debate on meaningful initiatives to protect children from harmful content. I further hope that industry and advertisers will take proactive steps to reforming the current trends in violent and sexual content.

I look forward to hearing from the witnesses on this pressing issue.

PREPARED STATEMENT OF HON. MICHAEL J. COPPS, COMMISSIONER,
FEDERAL COMMUNICATIONS COMMISSION (FCC)

Mr. Chairman, Mr. Vice-Chairman, Members of the Committee, while my duties at the FCC unfortunately prevented me from being in two places at once on the day of your hearing, I thank you for the opportunity to provide the Committee with my written testimony on a subject that is so important to the future of our country: our children and the need to better protect them from the ever-increasing violence they see on television. Let me also just take a moment to personally thank Senator Rockefeller whose unwillingness to accept business as usual when it comes to the

media's constant barrage of violent programming at our children is a lesson in leadership that I greatly admire and from which the country greatly benefits.

I know this because as I travel across the country talking with people about our Nation's media, I consistently hear from parents about what their children are seeing on television. I hear many voices but one common refrain—parents are afraid of many of the images television sends, upset at the kinds of behavior certain programming seems to condone, and totally turned off by the extraordinary and escalating violence being broadcast into our living rooms. Television is perhaps the most powerful force at work in the world today. When used for good, it can enlighten minds, convey powerful ideas, educate, and lay the foundation for human development. But when it is used to mislead, misrepresent and distort, it can—it does—inflict lasting harm.

Most of the evidence amassed over the past half century indicates a relationship between gratuitous violence and harmful effects—personal, psychological and social. The facts are extraordinary and alarming. Children watch on average between two and 4 hours of television every day; young children are masters of the remote control; and they often watch television unsupervised. The research taken as a whole strongly suggests that children's constant exposure to violence on television can be desensitizing, damaging and even devastating to them and to society-at-large. While research continues on how precisely children are affected by what they watch, it strikes me as already well-established that unfortunate and negative outgrowths result from the spreading virus of broadcast violence.

It is certainly the case that there is an important role for all of us to play when it comes to protecting our children from violent programming—parents, industry, the FCC, and Congress. Parents are of course the first line of defense, and without their active involvement it is difficult to envision a successful cure for the violence virus. Yet significant evidence indicates that no tools thus far available have been successful in containing the epidemic. This would include the V-chip, other control technologies and the existing television program ratings system. Industry's efforts have obviously not solved the problem and the preoccupation of some media—especially large national conglomerates often more interested in selling products to young people than in removing violence from the airwaves—does not provide much confidence that it will move to solve the problem. Given the impact of gratuitous violence on children and the pervasiveness of this kind of programming in our homes, it becomes altogether appropriate for Congress and the Commission to address the issue.

As you know, Members of Congress requested the FCC to report on this issue and to develop some options for you to consider. The recently-submitted FCC violence report was the Commission's response to that request. It surveys the problem, presents our considered "take" on the issue and develops several options for Congress to consider should it decide to develop legislation on the matter. It tees up such options as time channeling, viewer initiated blocking and mandatory ratings, as well as à la carte or bundling approaches in the cable and DBS context. Congress retains, of course, the prerogative to act. The FCC violence report married no one approach but instead responded to the request for analysis and options. In my view, this is the right approach and one that should be expected of the Commission more often. The Commission utilized its expertise and experience to develop a number of options in addressing this issue in order to assist Congress in making informed choices as part of its own deliberations.

To this end, the Commission unanimously concluded that it is appropriate for Congress to entertain taking action against program violence. Congress has the opportunity, should it choose to do so, to establish innovative, meaningful, and constitutional ways for safeguarding our children from violent programming when they are most likely to be in the viewing audience. I for one proceed acutely sensitive to the need for a carefully crafted approach. I want to see a solution that solves the problem without creating others. I recognize that it is not an easy challenge to develop rules that pass constitutional muster, but given what amounts to a public health crisis at hand, I believe it is a challenge that must be met. Serious and festering problems require solutions, so the question here is not *whether* we should address the issue, but *how* we should address it. Working together—citizens, industry and government—there is simply no reason why we should not be able to find workable solutions.

I hope and trust that the Commission's report and this hearing are the beginning drum beats of a march toward better safeguarding our children from excessively violent television programming.

ASSOCIATION OF NATIONAL ADVERTISERS
 AMERICAN ASSOCIATION OF ADVERTISING AGENCIES
 AMERICAN ADVERTISING FEDERATION
June 25, 2007

Hon. DANIEL K. INOUE,
 Chairman,
 Commerce, Science, and Transportation Committee,
 U.S. Senate,
 Washington, DC.

Dear Chairman Inouye:

The American Advertising Federation, the American Association of Advertising Agencies, and the Association of National Advertisers, Inc. are writing to express our deep concern about and opposition to sweeping proposals to extend the FCC's authority to regulate broadcast indecency to include depictions of violence. Among other things, we believe that neither the FCC nor Congress have begun even to address the many difficult policy and constitutional issues that would necessarily attend such a vast expansion of the Commission's authority over programming content. A thorough review of the evidence and growing body of case law demonstrates conclusively that the First Amendment problems of such a radical change in the law would be insurmountable.

On April 25, the Federal Communications Commission issued its long-awaited report entitled *Violent Television Programming And Its Impact of Children*, FCC Rcd. __, FCC 07-50 (rel. April 25, 2007). The FCC stated that, "[g]iven the findings in this *Report*, we believe action should be taken to address violent programming," and that Congress could craft rules to regulate "excessively violent" television programming consistent with judicial precedent. The FCC, however, did not attempt to define what it meant by "violent programming," as it promised to do. Instead, it merely acknowledged that "developing a definition would be challenging" and concluded only that "we believe Congress could do so." The Commission's admission that the task is "challenging" is a vast understatement, and its *Report* provides no basis for believing that Congress could do what the agency evidently could not. However, all existing precedent demonstrates that rules regulating images of violence on television would not survive judicial scrutiny.

We believe the FCC's superficial analysis failed to provide Congress with the guidance it requested in 2004 and neglected even to answer the questions set forth in the *Notice of Inquiry*. Moreover, the *Report*, while ostensibly unanimous, did not reflect the views of a unified agency. In this regard, Commissioners Jonathan Adelstein and Robert McDowell both issued skeptical assessments of the bottom line conclusions. As Commissioner Adelstein acknowledged, "[t]he difficult question is precisely which violent programming, if any, the government can regulate in the interest of protecting children. That question—the most challenging Congress faces—is never answered here." He compared the *Report* to "a financial consultant who advises a client that he could win the lottery" in that it "discusses an optimal conclusion but does not provide a complete analysis or a sound plan." Commissioner McDowell similarly discounted the *Report*, saying "I am disappointed that this *Report* does not provide more than a cursory mention of these important legal issues." He added that "today's parents have at their disposal more choices in parental controls and blocking technologies than ever before. Never have parents been more empowered to choose what their children should and should not watch." With this fact in mind, Commissioner McDowell called it "unfortunate" that "this *Report* does not sufficiently brief Congress on the full range of tools available or what can be done to mobilize parents in this pursuit."

It is a particular shortcoming of the Commission's violence *Report* that the FCC's ultimate analysis fails to reflect the extensive record the agency compiled in response to the *Notice of Inquiry*. The agency sought—and received—numerous comments from interested parties, yet its final *Report* did little more than restate its original questions in the form of conclusions. A reader of the FCC's *Report* would not know, for example, that each of the FCC's original questions prompted the submission of a great deal of data and critical analysis, and almost none of it was reflected in the final product.

Because Congress is now considering whether to embark on the dangerous and unconstitutional path of regulating images of violence, it is imperative that it be fully informed of the daunting hurdles it would need to overcome, such as the fact that no attempt to regulate programming that depicts violence has ever survived constitutional scrutiny. As the United States Court of Appeals for the Seventh Circuit has observed, "violence on television . . . is protected speech" and that "[a]ny other answer leaves the government in control of all the institutions of culture, the

great censor and director of which thoughts are good for us.” *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986). Moreover, in striking down restrictions on renting to minors videotapes that depict violence, the Eighth Circuit confirmed that violent video programming is entitled to “the highest degree of First Amendment protection.” *Video Software Dealer’s Ass’n v. Webster*, 968 F.2d 684, 689 (1992).

Since the FCC Report avoided discussing these critical issues, we are forwarding along with this letter a copy of the comments submitted to the FCC on our behalf.¹ The comments were written by well-known First Amendment attorney Robert Corn-Revere of Davis Wright Tremaine LLP and include an analysis of the relevant social science data by the noted expert Jonathan Freedman, Professor of Psychology at the University of Toronto.

The comments make a number of points, including the following:

- Any attempt by the Commission to regulate such programming would face insurmountable First Amendment hurdles. As the Tennessee Supreme Court has noted, “every court that has considered the issue has invalidated attempts to regulate materials solely based on violent content, regardless of whether that material is called violence, excess violence, or included within the definition of obscenity.” (See pp. 28–65 of the attached comments)
- Regulation of televised violence would impose either wholesale censorship or an incomprehensible standard. As one study reported, if all violence were eliminated, viewers would be unable to watch historical dramas like *Roots*, theatrical films like *Schindler’s List*, or a documentary on World War II. If, on the other hand, Congress or the Commission attempted to distinguish “good” depictions of violence from “bad” depictions, the resulting vague standard would impermissibly chill speech and would give the government too much discretion to curb disfavored expression. (See pp. 41–55)
- A failure to adequately define “violence” is fatal to any attempt to impose regulations in this area. What exactly is meant by the term “violent programming” bears on every aspect of the inquiry, from the amount of such programming that exists, to questions of its purported impact, and to whether the Congress or the FCC could adopt any regulations that are consistent with the First Amendment. (See pp. 1–4)
- Reports of studies and media effects from “violent programming” have been vastly misrepresented and exaggerated. Professor Freedman published an exhaustive review of all of the research on this topic and concluded that “evidence does not support the hypothesis that exposure to film or television violence causes children or adults to be aggressive.” Nor do claims of “desensitization” have any demonstrated connection to real world violence. (See pp. 5–20 & appendix)
- Actual experience with real-world aggression and violent crime provides an important reality check against claims that pictures of violence produce aggressive acts in real life. By almost any measure, we are living in a less violent society than in years past. Violent crime rates declined about 55 percent between 1994 and 2003, and a September 2004 Justice Department report found that the crime rate is at its lowest level since it began conducting the survey in 1973.² (See pp. 21–24)
- Regulation is unnecessary where technology provides individuals with the capacity to select which programs they wish to receive or exclude. As the Commission itself has observed, the modern media marketplace has greatly evolved, and “new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history.” (See pp. 24–28)

¹A copy of the comments, including the appendix and exhibits, is retained in Committee files. The comments otherwise may be accessed online at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516732888, and the appendix and exhibits may be accessed at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516732889.

²Since these comments were submitted to the FCC there have been minor variations in the crime statistics, but they were insufficient to alter the trend toward reduced violence. For example, the FBI’s Uniform Crime Report indicated a 1.3 percent increase in violent crime in 2005–2006, but the amount of forcible rape declined by 1.9 percent and aggravated assault dropped by 0.7 percent. Overall, despite recent minor upward fluctuations in some categories, the FBI reported a 3.4 percent decrease in violent crime over the past 5 years and a 17.6 percent decrease over the past 10 years. FBI, Crime in the United States (www.fbi.gov/ucr/05cius/offenses/violent_crime/index.html).

- In addition to the V-Chip that was implemented pursuant to the Telecommunications Act of 1996, myriad market-based technologies give television viewers a high degree of control over programming. These marketplace developments empower individuals and parents to accept or reject programming of their choice. Some types of parental controls are provided along with video service. Satellite customers have access to parental control technology, and analog cable subscribers can use their set-top boxes, or can lease or purchase a “lockbox” to lock specific channels so that the programming cannot be viewed.³ Digital cable subscribers can use their digital cable box to restrict viewing by rating, by program title, by time or date, or completely lock out certain channels or programs. Such blocking options allow parents to control programming in their homes without infringing others’ rights.⁴ (See pp. 24–28)

Without fully addressing these critical issues, the Commission’s *Report* blithely assumes that the broadcast indecency standard simply could be expanded to include programming that depicts violence. While the Commission was unable even to propose what a definition of violent depictions might include, it suggested that Congress could define which violent imagery should be considered “patently offensive to contemporary community standards” when viewed “in context.” However, the *Report* did little more than present its bare conclusion that Congress could dramatically expand content regulation. The FCC, however, is wrong. No judicial precedent supports the conclusion that programs that depict violence could be regulated as the Commission now suggests.

Even if the *Report’s* analysis is limited to the broadcast medium, its conclusion flies in the face of the June 4, 2007 decision by the United States Court of Appeals for the Second Circuit in *Fox Television Stations v. FCC*, ___ F.3d ___, 2007 WL 1599032 (2d Cir. June 4, 2007). Although the case was not decided on First Amendment grounds, the court devoted over nine pages to discussing the constitutional implications of any attempt to expand the definition of indecency beyond its original narrow construction. The court explained that “[w]e can understand why the Networks argue that FCC’s ‘patently offensive as measured by contemporary community standards’ indecency test coupled with its ‘artistic necessity’ exception fails to provide the clarity required by the Constitution, creates an undue chilling effect on free speech, and requires broadcasters to ‘steer far wider of the unlawful zone.’” *Id.* At *15 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). Citing the Supreme Court’s decision in *Reno v. ACLU*, the Court said: “we are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified ‘context’ of . . . broadcast indecency.” *Id.* at *15. The Commission’s unsupported assumption that Congress could expand the scope of the indecency rule to depictions of violence considered to be “patently offensive” in context is flatly inconsistent with the court’s constitutional analysis.

Our three associations, representing a broad spectrum of the advertising community, strongly believe that the Committee should reject outright the FCC’s invitation

³The cable industry has adopted a program in which any subscriber who currently lacks the technical capability to block unwanted programming may upgrade his or her equipment without charge to incorporate parental controls.

⁴Two-thirds of parents “closely monitor” their children’s media use, according to a new study released by the Kaiser Family Foundation on June 19, 2007. KFF, *Parents, Children & Media* (June 2007 at 7. While 43 percent of parents surveyed are aware that their television sets come equipped with V-Chip technology, according to Kaiser, almost half of those parents (46 percent) report having used the V-Chip. Significantly, of those parents who have used the V-Chip, 89 percent found it to be useful in blocking shows they don’t want their children to watch (and 71 percent described it as “very useful”). In addition, the Kaiser report found that 44 percent of parents say they have used other parental controls on their televisions, such as those provided by their cable or satellite companies. It also found that the vast majority of parents who have used any of the media ratings find them useful. Importantly, the Kaiser report found that most parents are confident that they already do enough to monitor their children’s media use.

that it participate in this radical and unconstitutional effort to expand the regulation of programming content.

Sincerely,

DANIEL L. JAFFE,
Executive Vice President,
Association of National Advertisers.

RICHARD F. O'BRIEN,
Executive Vice President,
American Association of Advertising Agencies.

JEFFRY L. PERLMAN,
Executive Vice President,
American Advertising Federation.

The Association of National Advertisers leads the marketing community by providing its members insights, collaboration and advocacy. ANA's membership includes 355 companies with 8,500 brands that collectively spend over \$100 billion in marketing communications and advertising. The ANA strives to communicate marketing best practices, lead industry initiatives, influence industry practices, manage industry affairs and advance, promote and protect all advertisers and marketers. For more information, visit www.ana.net.

The American Association of Advertising Agencies (AAAA), founded in 1917, is the national trade association representing the American advertising agency businesses. Its nearly 500 members, comprised of large multi-national agencies and hundreds of small and mid-sized agencies, maintain 2,000 offices throughout the country. Together, AAAA member advertising agencies account for nearly 80 percent of all national, regional and local advertising placed by agencies in newspapers, magazines, radio and television in the United States. AAAA is dedicated to the preservation of a robust free market in the communication of commercial and noncommercial ideas. More information is available at www.aaaa.org.

As the "Unifying Voice for Advertising™," the American Advertising Federation (AAF), headquartered in Washington, D.C., with a Western Region office in Newport Beach, California, is the trade association that represents 50,000 professionals in the advertising industry. AAF's 130 corporate members are advertisers, agencies and media companies that comprise the Nation's leading brands and corporations. AAF has a national network of 210 ad clubs and connects the industry with an academic base through its 210 college chapters. More information is available at www.aaf.org.

PREPARED STATEMENT OF JOANNE CANTOR, PH.D., PROFESSOR EMERITA, UNIVERSITY OF WISCONSIN-MADISON; ON BEHALF OF THE CENTER FOR SUCCESSFUL PARENTING

Mr. Chairman and members of the Committee, thank you for holding this hearing on the impact of media violence on children. Since 1974, I have been a professor at the University of Wisconsin, focusing the greater part of my research on the impact of media violence on children's aggressive behaviors and their emotional health. I have published many articles in refereed journals on this topic as well as a parenting book, *"Mommy, I'm Scared": How TV and Movies Frighten Children and What We Can Do to Protect Them* and a children's book, *Teddy's TV Troubles*. I was a senior researcher on the National Television Violence Study, and I have testified several times before the U.S. House and Senate and the FCC on these issues.

I have submitted my overall views on the impact of media violence to the FCC in response to their Notice of Inquiry in the Matter of Violent Television Programming and Its Impact on Children, and I attach a copy of those comments, which are also relevant to your hearing. Today, in my role as a Scientific Advisor to the Center for Successful Parenting, I am focusing specifically on brain research conducted by researchers at the Indiana University School of Medicine and supported by the Center. I alluded briefly to this research in my comments to the FCC.

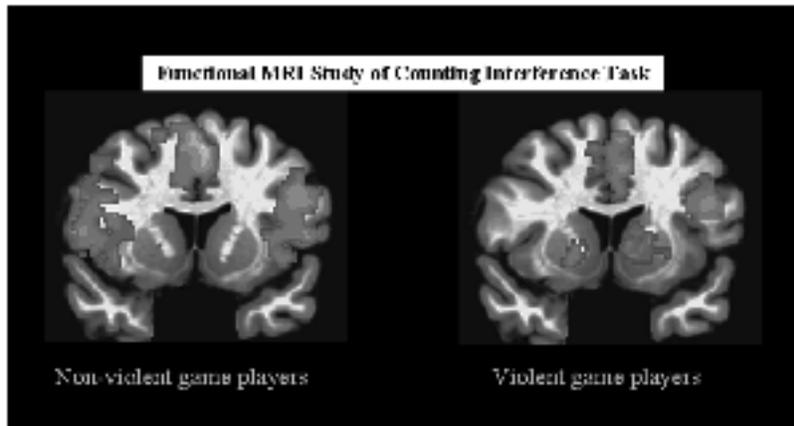
The research conducted at the Indiana University School of Medicine has contributed to the media violence issue in two innovative ways: by including children who are already experiencing problems with violence and by focusing on the functioning of the brain. First, a study by Kronenberger and associates (2005) looked at the relationship between media violence exposure and violent behavior in groups of adolescents whose levels of aggression are outside the normal range—those adolescents with Disruptive Behavior Disorder (DBD). This study demonstrated that adolescents with the diagnosis of DBD have significantly higher exposure to both television and video game violence than do normal adolescents, and this relationship is not due

to differences in gender, age, or intelligence. A further study (Kronenberger *et al.*, 2004) showed that media violence exposure is associated with poorer performance on tasks that involve the ability to both respond to stimuli and inhibit incorrect responses. More importantly, the IU Medical School studies on brain functioning show that both highly aggressive youth and youth with heavy exposure to media violence have brains that function differently from their less aggressive peers and differently from the brains of those who are less heavily exposed to media violence (Kalnin *et al.*, 2005; Matthews *et al.*, 2005; Wang *et al.*, 2002).

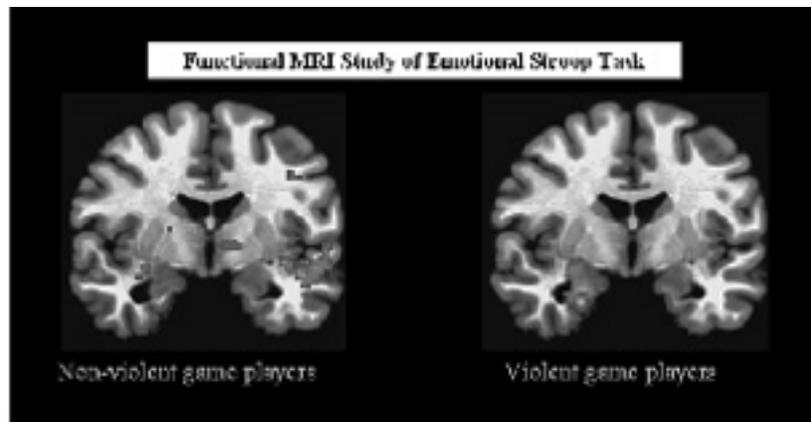
These researchers have conducted functional magnetic resonance imaging (fMRI) of adolescents' brains while they viewed images from violent video games and while they performed other tasks. fMRI measures the tiny metabolic changes that occur when a part of the brain is active. These changes appear as a brightly colored area on the MR image, indicating the part of the brain that is being used to process the task. The evidence suggests that teens diagnosed with DBD have less activity in their brain's frontal lobes while watching violent games than do those without the diagnosis. The frontal lobe is the area of the brain responsible for decision-making and behavior control, as well as attention and a variety of other cognitive functions. The researchers also found that among the nonaggressive adolescents (those without the DBD diagnosis) there were similar differences in brain activity as a function of the amount of violent media exposure they had had during the preceding year. Non-violent adolescents who had more exposure to media violence showed lower activity in their brain's frontal lobes both while viewing violent video games and while performing a decision-making exercise. In other words, like teens with disruptive behavior disorder, teens with high media violence exposure had lower activity in the logical part of their brains. Although these studies do not prove a causal connection between media violence and reduced brain function—the most recent phase of this research does suggest a causal connection.

The latest study (Matthews *et al.*, 2006) found that adolescents who play violent video games may exhibit lingering effects on brain function, including increased activity in the region of the brain that governs emotional arousal and decreased activity in the brain's executive function, which is associated with control, focus and concentration. The study suggests that playing a violent video game may have different short-term effects on brain function than playing a nonviolent—but exciting—game.

In the research, 44 adolescents were randomly assigned to play either a violent video game (*Medal of Honor: Frontline*) or a nonviolent video game (*Need for Speed: Underground*) for 30 minutes. The researchers then used fMRI to study brain function during a series of tasks measuring inhibition and concentration. One test used emotional stimuli and one did not. The two groups did not differ in accuracy or reaction time for the tasks, but analysis of the fMRI data showed differences in brain activation. Compared with the group that played the nonviolent game, the group that played the violent video game demonstrated less activation in the prefrontal portions of the brain, which are involved in inhibition, concentration and self-control, and more activation in the amygdala, which is involved in emotional arousal. In other words, during tasks requiring concentration and processing of emotional stimuli, the adolescents who had just played the violent video game showed distinct differences in brain activation from the adolescents who had played an equally exciting and fun—but nonviolent—game. Because of random assignment to the two different video games, the two groups should have been equivalent to begin with; therefore, the most likely factor accounting for these differences would be exposure to either the violent or nonviolent video game during the experiment. This design suggests a causal connection.



Functional MRI study of Counting Interference Task—violent and non-violent game players.



Functional MRI study of Emotional Stroop Task—violent and non-violent game players.

The bottom line is that in both controlled, short-term experimental studies and in longer-term studies of viewing habits, exposure to media violence has been associated with reduced function in the areas of the brain associated with impulse control and decision-making and increased activity in brain areas associated with emotion. These findings suggest that even beyond the long-established impact that exposure to media violence has on imitation, desensitization, hostility, and fear (see my attached comments), there may be serious consequences of media violence that affect young people's brain development and functioning. This makes the issue of the ongoing cultural experiment of immersing our children in a world of virtual violence even more urgent and critical.

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Attachment

Comments of Joanne Cantor in Response to FCC Notice of Inquiry in the Matter of Violent Television Programming and Its Impact on Children

UNIVERSITY OF WISCONSIN-MADISON

September 15, 2004

I thank the FCC for their Inquiry into the matter of “Violent Television Programming and Its Impact on Children.” Since 1974, I have been a professor at the University of Wisconsin, focusing the greater part of my research on the impact of media violence on children’s aggressive behaviors and their emotional health. I have published many articles in refereed journals on this topic as well as a parenting book, “Mommy, I’m Scared: How TV and Movies Frighten Children and What We Can Do to Protect Them” (Cantor, 1998) and a children’s book, “Teddy’s TV Troubles” (Cantor, 2004b). I was a senior researcher on the National Television Violence Study, and I have testified several times before the U.S. House and Senate and the FCC on these issues.

(1) Effects of Violent Programming.

Researchers know a lot about the effects of media violence. Study after study has found that children often behave more violently after watching media violence. The violence they engage in ranges from trivial aggressive play to injurious behavior with serious medical consequences. Children also show higher levels of hostility after viewing violence, and the effects of this hostility range from being in a nasty mood to an increased tendency to interpret a neutral comment or action as an attack. In addition, children can be desensitized by media violence, becoming less distressed by real violence and less likely to sympathize with victims. Finally, media violence makes children fearful, and these effects range from a general sense that the world is dangerous, to full-blown anxieties, nightmares, sleep disturbances, and other trauma symptoms. (See Cantor, 2002b, for a more thorough discussion of the media violence research findings.)

The evidence about these effects of media violence has accumulated over decades. Meta-analyses, which statistically combine all the findings in a particular area, demonstrate that there is a consensus on the negative effects of media violence. They also show that the effects are strong—stronger than the well-known relationship between children’s exposure to lead and low I.Q. scores, for example. These effects cannot be ignored as inconclusive or inconsequential. (See Bushman & Anderson, 2001.)

Even more alarming, recent research confirms that these effects are long-lasting. A study from the University of Michigan shows that TV viewing between the ages of 6 and 10 predicts antisocial behavior as a young adult. In this study, both males and females who were heavy TV-violence viewers as children were significantly more likely to engage in serious physical aggression and criminal behavior later in life; in addition, the heavy violence viewers were twice as likely as the others to engage in spousal abuse when they became adults. This analysis controlled for other potential contributors to antisocial behavior, including socioeconomic status and parenting practices (Huesmann *et al.*, 2003; see also Johnson *et al.*, 2002).

The effects of media on fears and anxieties are also striking (Cantor, 2002a). Research shows that intensely violent images often induce anxieties that linger, interfering with both sleeping and waking activities, sometimes for years. Children’s

viewing of media and particularly media violence is associated with symptoms of posttraumatic stress and with sleep disorders (Singer, *et al.*, 1998; Owens, *et al.*, 1999). Long-term fear effects are also common consequences of exposure to violence in the news (Applied Research & Consulting, 2002; Cantor & Nathanson, 1996; Smith *et al.*, 2002). Many young adults report that frightening movie images that they saw as children (often on television) have remained on their minds in spite of their repeated attempts to get rid of them. They also report feeling intense anxieties in nonthreatening situations as a result of having been scared by a movie or television program—even though they now know that there is nothing to fear (Harrison & Cantor, 1999; Cantor, 2004a). Findings are beginning to emerge from research teams mapping the areas of the brain that are influenced by violent images, and these studies suggest that the viewing of media violence is associated with changes in brain circuitry suggesting a predisposition to reduced impulse control and the long-term storage of violent images (See Center for Successful Parenting, 2003; Matthews, 2002; Murray, 2001a, 2001b; Wang *et al.*, 2002).

There is a broad consensus of scientific researchers that media violence exerts unhealthy effects on young viewers. One dissenting view of the issue comes from Jonathan Freedman (2002) whose book, “Media Violence and Its Effect on Aggression,” comes to the conclusion that the media violence research is flawed. Professor Freedman acknowledges that his review of research was funded by the Motion Picture Association of America. (See Cantor, 2002c, for a review of this book, which appeared in the *Journalism and Mass Communication Quarterly*).

(2) What Kinds of Programs are of Greatest Concern?

To answer this question, one needs to specify which effects are at issue. Certain types of violent depictions increase the risk that a viewer will behave aggressively, while other types increase the risk of anxiety and sleep disturbances. For example, aggressive acts with attractive perpetrators who are rewarded for behaving aggressively, and for which the consequences to the victim are minimized are likely to promote imitation. This type of depiction is common in cartoons and slapstick fare and in many crime dramas. In contrast, graphic violence against an attractive target is more likely to promote fear. Many movies (which are frequently shown on television) contain this type of violence. Comic violence is likely to promote imitation and desensitization, but unlikely to provoke fear. Although violence that is perceived as realistic is generally more likely than fantasy violence to produce harmful effects, children up to the age of eight are unclear on the fantasy-reality distinction. Therefore, fantasy violence can be as harmful to young children as realistic violence. (Center for Communication and Social Policy, 1998).

To give a concrete example of the difficulty of singling out depictions as more or less harmful, “Schindler’s List” has appropriately been lauded as a film with an anti-violence theme, and one that is unlikely to promote aggression. However, this movie is likely to traumatize young viewers, who are not ready to assimilate such disturbing images and events. To help maintain their children’s mental health, parents need as much warning about the presence of potentially traumatizing images as they do about aggression-promoting depictions. As another example, many people grew up enjoying classic cartoons like “Woody Woodpecker” and “The Roadrunner.” Although these cartoons may appear harmless on the surface and are rarely the cause of nightmares, research shows that they often prompt imitation and promote attitudes favoring violence in young children (Center for Communication and Social Policy, 1998).

Because of the varied types of effects that different types of violent depictions have, it would seem difficult to define the types of violence that are of particular concern and thereby more subject to regulation than others. A more reasonable approach than trying to define the types of violence that might be restricted would be to provide valid and easily accessible information to parents and other consumers so that they might make informed choices, and so that they might enforce their choices either by rules within the home or by using filtering or blocking devices that would be both easy to program and effective.

(3) TV Parental Guidelines and the V-Chip.

In theory, media ratings and blocking devices are the best ways to ensure that parents have the opportunity to exert control over their children’s access to potentially harmful programs without violating the freedom of speech rights of other people. However, research shows that we have a long way to go before parents can use these tools effectively. Awareness of the TV rating system has declined steadily since it was introduced (Woodard, 2000). Many parents still do not understand the meanings of the TV ratings, especially those that signify violence in children’s programs (Bushman & Cantor, 2003). Recent research shows not only that many par-

ents who have V-chip-equipped sets do not know that their set contains the device, but also that the V-Chip as currently configured is extremely difficult to program (see Jordan & Woodard, 2003, for the most recent data and Annenberg Public Policy Center, 2003, for the transcript of a more in-depth discussion of these issues).

(4) Possible Regulatory Solutions.

In the absence of a means of defining “excessively violent programming that is harmful to children” in a consistent way that conforms to research findings and is not overly broad, it seems to me that improvements in ratings and blocking technologies would be far preferable to instituting “safe harbor” legislation. To this end, the FCC and Congress should seek solutions with the following goals:

(a) Creating or facilitating a rating system (or rating systems) that accurately denotes problematic content in a way that is easily understood by parents. One approach would be to mandate such a universal rating system for all media. Another approach would be to facilitate the development of multiple rating systems that would allow parents to choose whichever system they find most useful.

(b) Modifying the V-Chip hardware so that it can accept potential changes in the current rating system and so that it can capacitate a variety of rating systems that might be developed by independent groups.

(c) Permitting blocking devices to block any type of violent content that is harmful to children. In these days of incessant terror warnings and other traumatic news events, parents should have the option of blocking news programming, and especially breaking-news bulletins and promotional announcements for upcoming news stories. They should also have the option of blocking advertisements for violent movies and other ads that contain violence. This would protect children from being “ambushed” by images and materials that even the most vigilant parent would not be able to predict, without interfering with other people’s “right to know.”

(d) Providing funding for the promotion of information that parents need to protect their children from the harms of media violence, including information about media effects and information about the meaning and use of rating systems and the use of the V-Chip and other blocking technologies. It would certainly be fair for this funding to come from license fees or other charges to the television industry rather than from general tax dollars.

(5) Conclusion.

Media violence constitutes a severe health threat to our youth, and the FCC, acting in the public interest, should move to provide parents with the information and tools they need to shield their children from some of the harms that might otherwise occur in their own homes by exposure to television. The television industry which, along with other media industries, typically denies any links to harm and opposes measures that help parents protect their children from its products (see Cantor, 2002d), should be obliged to cooperate in this effort as part of its public interest responsibilities.

These issues are important and complex, and I would be glad to provide further information or answer questions about my comments if the Members of the Commission are interested.

JOANNE CANTOR, PH.D.,
Professor Emerita,

University of Wisconsin-Madison.

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AMERICAN CIVIL LIBERTIES UNION
June 26, 2007

Hon. DANIEL K. INOUE,
 Chairman,
 Committee on Commerce, Science, and Education,
 Washington, DC.

Hon. TED STEVENS,
 Vice Chairman,
 Committee on Commerce, Science, and Education,
 Washington, DC.

RE: SENATE HEARING ON THE IMPACT OF MEDIA VIOLENCE ON CHILDREN

Dear Senators Inouye and Stevens:

On behalf of the American Civil Liberties Union (ACLU), and its hundreds of thousands of members, activists, and fifty-three affiliates nationwide, we urge you to reject any proposals that would allow the Federal Communications Commission to regulate violence on television. The FCC's recent report suggests taking that overwhelmingly parental right and placing it impermissibly in the hands of politicians.

The American Civil Liberties Union is committed to preserving and protecting free speech and the First Amendment and strongly believes that the government should not replace parents as decisionmakers in America's living rooms. There are some things the government does well, but deciding what is aired and when on television is not one of them. Parents already have many tools to protect their children, including blocking programs and channels, changing the channel, or turning off the television. If we need to provide parents with more effective tools and/or a better understanding of how to use the tools that are available to them, our focus should be on making those educational opportunities available—not encouraging government to replace America's parents as the primary decisionmakers in their own homes. Government should not parent the parents.

The Federal Communication Commission's April 2007 Report on Violent Television and its Impact on Children erroneously concluded that under Supreme Court precedent allowing regulation of indecency in the media, Congress has a legal basis to regulate violent television content. The Report further recommended that Congress take action to address violent programming, including limiting violence to specific hours of the day or forcing cable and satellite operators to sell their channels on an à la carte basis.¹

The ACLU repeatedly has voiced its concern over both the constitutionality of governmental regulation of violent programming and the adequacy of the research that the FCC uses to justify regulation. Our concern is that imposing standards for television violence would be unconstitutional and damage numerous important values that define America: the right to a free and open media, the right to free speech and the right of parents to control the upbringing of their children.

Parents Have the Power to Control What Their Kids Watch

Parents play a central role in the lives of their children. Today, they have unprecedented capability to control what comes into their homes and what media their children consume. Aside from the ability to just turn off the TV, parents can use the many forms of technology available to them to block channels and programs.

The tools available to parents are many and varied. The most basic and user-friendly tool every parent has against unwanted media content is the ability to turn the television off, or to establish rules about where and when children may watch TV. Current technology augments parental ability to block unwanted content. Television ratings provide a baseline for predicting objectionable content in upcoming shows. The V-chip, a standard feature in all televisions 13 inches and larger since January 2000, allows viewers to block specific programs based on ratings; multiple websites, including the FCC's own site, provide detailed instructions and tutorials on how to use the V-chip. Cable and Satellite television subscribers can block individual channels using either analog or digital set-top boxes.

Recent technology in digital boxes permits blocking by rating, channel, title, and even, in some systems, program description. Cable subscribers that do not have set-top boxes can simply ask their cable companies to block specific channels that they do not want in their homes. Additionally, a multitude of websites rate television

¹In the Matter of Violent Television Programming and Its Impact on Children, FCC 07-50, 22 FCCR 7929, MB 04-261 at 3 (April 25, 2007).

shows, permitting parents to choose one that suits their individual taste and use those ratings to determine what their children watch.

The Supreme Court has vigorously underscored the vital role parents play in determining what media content enters their homes. Importantly, the Court has emphasized that parental action and available technology do not have to be perfect to be preferable to governmental action, specifically stating that “[i]t is no response that voluntary blocking requires a consumer to take action, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.”² The Courts have recognized that parents already have all of the technology they need to block unwanted media content from their homes, and have made clear that the responsibility remains on the parents to actually use those controls available to them.

Such technology enables and facilitates precision in parental efforts to monitor the media content that enters their home. Nevertheless, the FCC’s Report declared current technology ineffective based on limited consumer use. However, limited consumer use of these technologies does not render the current technology unworkable or inadequate; rather, it indicates areas for more consumer education, awareness, and improvement.

The government may have a role in educating parents about media literacy, and assisting them in finding tools that better help them analyze and evaluate what they see.

Congress could consider passing legislation to better educate parents and children and ensure that parents are able to use the tools and the technologies that are already available to them. The solution is to teach parents to use the tools at their disposal more often and more effectively, as they see fit. If parents are upset by what they see on television, they have the power to change the channel, turn off the TV, or block the station. Monitoring television habits and determining what content is and is not appropriate should be made in the home, not by government officials in Washington, D.C.

Studies on Media Violence Causing Actual Violence Are, at Best, Inconclusive

The FCC’s Report presents a slanted view of the studies on exposure to media violence to support its erroneous contention that there is a substantial governmental interest in regulating violence. Though the Report mentions the FTC’s 2000 Report,³ the FCC fails to reference the Study’s more important Appendix A, which reviewed and analyzed the available research on the impact of violence in the entertainment media. Regarding causation, the FTC noted that “[m]ost researchers and investigators agree that exposure to media violence alone does not cause a child to commit a violent act, and that it is not the sole, or even the most important, factor in contributing to youth aggression, anti-social attitudes, and violence.” Rather, the FTC stated that the research on causation had identified “interacting risk factors, such as genetic, psychological, familial, and socioeconomic characteristics.”

Such a finding is in line with the brief submitted on behalf of 33 media scholars in the case of *Interactive Digital Software Association v. St. Louis* in 2002, which the FCC never mentioned.⁴ Those scholars stated that “[i]f one conclusion is possible, it is that the jury is not still out. It’s never been in. Media violence has been subjected to a lynch mob mentality, with almost any evidence used to prove guilt.” Actual violent crime statistics provide support for these findings and statements, and demonstrate that the conclusion that media violence causes actual violence is intuitively incorrect. While media violence was increasing, the violent crime rate—specifically the juvenile crime rate—was decreasing throughout the 1990s, according to FBI statistics. If media violence was a causative factor, one would expect to see a rise in violent crime, rather than a decrease.

Notably, courts examining allegations that violent video games cause actual violence have been unconvinced by the data, holding laws restricting minors’ ability to obtain violent video games unconstitutional.⁵ State efforts to restrict youth’s access

² *United States v. Playboy*, 529 U.S. 803, 824 (2000).

³ Marketing Violent Entertainment to Children: A Review of the Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries: A Report of the Federal Trade Commission (Sept. 2000).

⁴ The brief was submitted to the FCC as an attachment to the ACLU’s Comment on Notice of Inquiry, MB Docket No. 04–261; In the Matter of Violent Television Programming And Its Impact on Children, dated September 14, 2004.

⁵ See e.g., *Kendrick*, 244 F.3d at 575 (“[N]o showing has been made that games of the sort found in the record of this case have [the effect of inciting youthful players to breaches of the peace]”).

to violent video games attempted to use a similar framework as that recommended by the FCC for media violence: equate violence with indecency. The courts, however, have insisted that violence and indecency are distinct types of speech.⁶

It has become clear that there is no one single factor that causes violence; the causes of violence are many and varied and the problem is complex. We urge Congress to reject any proposals that would allow the Federal Communications Commission to regulate violence on television. Any attempt to force “violence” into a “safe harbor” would be unwise, unconstitutional and would ignore the root causes of violence.

There is a long history of using the media as a scapegoat for society’s problems. At one time or another, books, movies, opera, jazz, blues, rock ‘n roll, heavy metal and rap music, comic books, and video games have all been accused of causing anti-social or violent behavior among minors and adults. Crime statistics do not support these claims. Despite the explosive growth of the media in the 1990s, which included allegedly increased violence on television and in video games, crime in general (and youth crime in particular) declined.

It would be virtually impossible for the government to create a definition of violence that would allow “acceptable” violence and would restrict “unacceptable” violence.

Assumptions about the negative effects of viewing violence ignore the positive societal value of certain violent programs that teach us important lessons about history or call attention to problems society must address. “Roots” was a national television event of enormous educational value that necessarily showed the brutality of the institution of slavery. The made-for-television movie “The Burning Bed” was credited with bringing about reform of existing spousal-abuse laws and included what some would call disturbingly violent scenes. “Saving Private Ryan” was a powerful move about the horrors of war, and included many disturbing scenes to illustrate that point.

Shielding children from all violence ignores reality and ill-prepares them for participation in a world that embraces violence. As one court striking down regulations of violent video games wrote, history, most notably “the murderous fanaticism displayed by young German soldiers in World War I”, aptly illustrates the danger of allowing the government to control children’s access to information and opinion, depriving them of the “freedom to form their political views on the basis of uncensored speech” before they turn eighteen and are able to vote.⁷ “People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble. . . . To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.”⁸

Since not all portrayals of violence are bad, the government would have insurmountable difficulty defining what is “good” violence and “bad” violence. Even those who research this issue use inconsistent definitions of violence. If the researchers cannot concur on an objective definition, then will any regulations or ratings provide truly objective results that please all parents?

Similar to concerns about the feasibility of defining violence, one court noted that the FCC’s indecency test was “undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague.”⁹ Specifically, the court used the example of “Saving Private Ryan”, in which repeated use of four letter words was not considered indecent, profane, or gratuitous. In comparison, a single use of those same words was considered “shocking and gratuitous” when used at the Golden Globes.¹⁰ The inconsistent standard in defining “indecency” created an impermissible “chilling effect on free speech.”¹¹ Likewise, adequately defining “violence” will present similar unconstitutional chilling effects.

It would be virtually impossible for the government to create a definition of violence that would allow “acceptable” violence and would restrict “unacceptable” violence. Any such definition likewise would be indiscernible and inconsistent, and

⁶*Id.* at 574.

⁷*American Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 576–577 (7th Cir. 2001).

⁸*Id.* at 577.

⁹*Fox Television Stations, Inc. V. Federal Comm’n Comm’n*, No. 06–1760–AG (L), 2007 WL 1599032, at *15 (2d Cir. June 4, 2007). Note that the indecency regime that the court found impermissibly vague was the basis for the FCC’s conclusion it had the authority to regulate violence on television. Thus, that conclusion is also suspect.

¹⁰*Id.*

¹¹*Id.* at *15–16.

would chill speech by requiring broadcasters to “steer far wider of the unlawful zone” and would thus violate the First Amendment.¹²

FCC Recommendations for Regulation Violate Constitutionally Protected Expression

Courts have found that violent speech and violent depictions are protected by the First Amendment.¹³ The Supreme Court has determined in several cases that “speech that many citizens find shabby, offensive, or even ugly” is still protected. The First Amendment makes it clear that the government should have no power to restrict expression because of its messages, its ideas, its subject matter, or its content.¹⁴ Moral and aesthetic judgments are for the *individual* to make, not the government, even with a mandate or approval of a majority.¹⁵

The overriding justification for regulation of television violence “is the concern for the effect of the subject matter on young viewers.”¹⁶ Clearly, any such regulation by the government would be content-based. Content-based speech restrictions are subject to strict scrutiny. Strict scrutiny requires that any content-based speech regulation must be narrowly tailored to promote a compelling government interest. If a less restrictive alternative would serve the Government’s purpose, it must use that alternative.¹⁷

The FCC’s reliance on the 1978 decision in *FCC v. Pacifica Foundation* as authority to regulate media violence is outdated. The *Pacifica* Court premised its holding on reduced First Amendment protection for broadcasting, permitting restrictions based on substantial—not compelling—governmental interests. The *Pacifica* Court reasoned that the lower standard was proper because of the medium’s “uniquely pervasive” presence in the lives of all Americans” and on its accessibility to children, coupled with the government’s interests in the well-being of children and in supporting parental supervision of children.”¹⁸

A recent Second Circuit Court decision rejected the FCC’s continuing reliance on *Pacifica* in light of the substantial advancements in technology. The court went so far as to state that it would be “remiss not to observe that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children.”¹⁹ The proliferation of satellite channels, cable television channels, and the Internet “ha[ve] begun to erode the ‘uniqueness’ of broadcast media.”²⁰ At the same time, “blocking technologies such as the V-Chip have empowered viewers to make their own choices about what they do, and do not, want to see on television.”²¹

Similarly, the Supreme Court’s *Playboy* decision distinguished *Pacifica* on the grounds that “[c]able systems have the capacity to block unwanted channels on a household-by-household basis.” Therefore, “the option to block reduces the likelihood, so concerning to the court in *Pacifica*, that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem.” The FCC’s regulatory powers are bounded by the Constitution, and the Courts have recognized that technology has changed the role Government can play.

The Supreme Court has specifically recognized that cable technology permits a level of control over media content that was not contemplated by the *Pacifica* Court. The Court in *Playboy* dealt with a statute requiring cable providers either to completely scramble sexually explicit or indecent channels or limit the programming on such channels to a 10 p.m. to 6 a.m. “safe harbor” time period in order to shield children.²² The Supreme Court struck down these provisions of the statute because less restrictive alternatives allowing consumers to block those channels existed, stating that “targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.”²³ The Court stated that “these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the

¹² *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

¹³ FCC Report at 11 (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)).

¹⁴ *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972).

¹⁵ *Playboy*, 529 U.S. at 818.

¹⁶ *Id.* at 811.

¹⁷ *Id.* at 813.

¹⁸ *FCC v. Pacifica Found.*, 438 U.S. 726, 748–50 (1978).

¹⁹ *Fox v. FCC*, 2007 WL 1599032, at *17.

²⁰ *Id.* at *18.

²¹ *Id.*

²² *Playboy*, 529 U.S. at 806.

²³ *Id.* at 809–810, 815.

potential of this revolution if we assume the Government is best positioned to make these choices for us.”²⁴

Courts have rejected the FCC’s very arguments regarding the ineffectiveness of current technology as a reason to impose further regulation. In *Fox*, the FCC argued that the V-Chip was an ineffective alternative, because “in its view, few televisions feature a V-Chip, most parents do not know how to use it, programs are often inaccurately rated, and fleeting expletives could elude V-Chip blocking even if the show during which they occurred was otherwise accurately labeled.”²⁵ The Court concluded that “[i]f the *Playboy* decision is any guide, technological advances may obviate the constitutional legitimacy of the FCC’s robust oversight.”²⁶

Conclusion

Parents have the tools they need to protect their children. If the government steps in and regulates the content of television shows or relegates certain shows to a late-night or early morning hour, it steps over the line and begins to parent the parents—replacing parents as the ultimate decisionmakers in their children’s lives.

The FCC’s findings on violence provide a disputable basis for a governmental interest in regulation. Recent court decisions, ignored by the FCC in its report, clearly show that in light of the current technologies enabling parents to control content precisely and through a variety of mechanisms, the government will need to demonstrate a compelling basis before it can regulate media content [note that the FCC didn’t ignore the *Fox v. FCC* decision—it came out June 4 (and its statements on constitutionality are *dicta*)—LB]. In addition, the means of regulation will have to be narrowly tailored. It is obvious that the time channeling and à la carte solutions suggested by Congress are neither the most effective ways of protecting children nor the most narrowly tailored means of achieving protection constitutionally.

The most effective and most precise mechanisms are those already available to all parents. The power to control the upbringing of their children, including what they watch should remain in the most capable, effective, and constitutional hands possible: the parents’.

If you have any questions, please do not hesitate to call Terri Schroeder.

Sincerely,

CAROLINE FREDRICKSON,
Director.
TERRI SCHROEDER,
Senior Lobbyist.

PREPARED STATEMENT OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (“NAB”) submits for the record this statement concerning the constitutionality of potential legislation restricting programming with violent content on broadcast television. NAB is a trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other Federal agencies, and the Courts.

Introduction and Summary

While NAB and its member stations understand that some television viewers do not want to see certain violent content and also that some violent images may not be appropriate for young children, we respectfully urge Congress to resist calls to adopt legislation barring broadcast of some violent content except during late night hours. As the courts have concluded in numerous contexts, governmental attempts to censor violent content are fraught with constitutional problems under the First Amendment, the bedrock of our democracy. Thus, there are competing principles at stake, and Congress must be especially careful to avoid overreaching in this constitutionally sensitive area. Specifically, Congress must recognize that this is an area where parents are much better positioned than the government to decide what kinds of television programs are appropriate for their children.

Currently, a broad and growing range of tools are available to help parents guide their children’s television-viewing habits. The television industry is, moreover, now conducting an extensive campaign to educate parents on how they can use these many tools to control effectively their children’s television consumption. Adopting legislation directly regulating violent material on television—especially at a time

²⁴*Id.* at 818.

²⁵*Fox v. FCC*, 2007 WL 1599032, at *18.

²⁶*Id.*

when consumers have unprecedented control over the video programming that enters their homes—would impermissibly substitute the government’s judgment for that of parents, while also interfering with the right of adults to watch what they want.

A law dictating that certain violent content may not be broadcast on television except late at night is very likely to be struck down by the courts. To begin with, it is virtually impossible to formulate a constitutionally acceptable definition of the type or types of violent programming that should be banned from television during most hours. It is not an accident that no law on the books in any state or at the Federal level restricts violent content. Every attempt to do so—in the context of videos, trading cards, books, and video games—has been struck down by the courts, in part because every definition of targeted violent content runs into problems with vagueness and overbreadth. Regulations targeting depictions of violence—which are fully protected speech under the First Amendment—would meet the same fate.

Leaving aside the definitional problem, a law regulating depictions of violence on broadcast television would single out a particular category of protected speech for disfavored treatment. That kind of discriminatory burden on speech is directly at odds with fundamental First Amendment principles, and courts have consistently subjected content-based laws to the strictest form of constitutional scrutiny. The justifications for regulation that could be offered here are far too weak to satisfy such scrutiny. Prior cases, principally involving attempts to regulate distribution of violent video games to minors, illustrate the problem: the social scientific studies on the effects of exposure to violent material are far too thin a reed to justify content-based regulation of fully protected speech.

Some have suggested that the government may nevertheless impose content-based restrictions in the context of over-the-air television broadcasts, citing to the Supreme Court’s decision in *Pacifica*. But that decision has never been expanded beyond the narrow context of so-called “indecent” programming, and provides no support for the government to take the unprecedented step of censoring images of violence. Indeed, there are serious questions about whether *Pacifica* is viable anymore, even in the context of indecency. There remains little, if any, reason to treat the content of broadcast television programs differently, in terms of First Amendment protection, from the content of other programming delivered alongside broadcast stations over cable and satellite systems. To the contrary, courts are likely to conclude that broadcast television is entitled to the same level of strong First Amendment protection. And there is no question that proposed restrictions on televised depictions of violence would fail strict First Amendment scrutiny.

In short, we understand parents’ desire to ensure that their children are not exposed to televised content, including violent images, they believe inappropriate. But particularly in light of the myriad technological and other alternatives for consumers to control the television programming entering their homes, the Constitution forbids Congress from seeking to empower parents by censoring speech.

Analysis

I. Any Attempt to Define a Regulated Category of Violent Depictions Will Prove Unworkable and Thus Unconstitutional

In a recent report, the Federal Communications Commission suggested “that developing an appropriate definition of excessively violent programming would be possible.”¹ Notably, the FCC itself did not propose a definition, despite having considered the issue for 3 years. This is not surprising, because court after court has rejected state and local laws regulating depictions of violence, in part because of the definitional problem. As these courts have recognized, attempts to define the kind of violence that the government thinks may be harmful inevitably result in overbroad and vague laws. As applied to television, such definitions would produce a chilling effect on valuable expression that legislators did not intend to affect.

Under the well-established vagueness doctrine, statutes must be drafted with “sufficient definiteness that ordinary people can understand what conduct is prohibited.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); see *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Where protected expression is regulated, the Constitution requires special precision, because of the potential for chilling speech. See *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997); *NAACP v. Button*, 371 U.S. 415, 433 (1963). The First Amendment overbreadth doctrine, moreover, prohibits broadly-worded laws that restrict a substantial amount of protected speech. See *Reno*, 521 U.S. at 874; *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 254–55 (2002).

¹ *Violent Television Programming And Its Impact On Children*, Report, FCC 07–50 at ¶44 (rel. April 25, 2007) (“Report”).

Proponents of regulating violence on broadcast television will certainly argue that it is possible to define violent content in a way that passes constitutional muster. But the clear judicial record shows otherwise. The courts have unanimously rejected attempts to censor violent content despite numerous approaches to defining such content.

Winters v. New York. Judicial rejection of state attempts to regulate violent content began nearly 60 years ago, when, in *Winters v. New York*, 333 U.S. 507 (1948), the Supreme Court struck down as vague a law restricting “true crime” novels. In so ruling, the Court stated that violent speech is “as much entitled to the protection of free speech as the best of literature.” *Winters*, 333 U.S. at 510. The Court found the New York statute’s terms—which prohibited tales of criminal deeds of bloodshed and lust “so massed as to become vehicles for inciting violent and depraved crimes against the person,” *id.* at 518–19—to be “too uncertain and indefinite.” *Id.* at 519. The Court noted that the statute could be used to punish valuable stories and photographs, and that it would be impossible for people to determine which types of stories were banned by the law. *Id.* at 519–20.

Modified Obscenity Standards. More recently, the courts have rejected laws regulating violence using terms modeled on the doctrine of obscenity. Sexual speech may be regulated as “obscene” if (1) it predominantly appeals to the prurient interest; (2) it depicts sexual conduct specifically defined by the applicable law in a manner that is patently offensive; and (3) taken as a whole, it lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973). In addition, a similar “harmful to minors” standard permits the government to restrict minors’ access to certain sexually explicit speech. See *Ginsberg v. New York*, 390 U.S. 629, 638 (1968).

The FCC Report suggested that images of violence on broadcast television may be regulated using at least some of the parts of the obscenity standard. See Report ¶44. But, that suggestion is at odds with the Supreme Court’s decision in *Winters v. New York*, which stated that violent material is not “indecent[] or obscene[] in any sense . . . known to the law.” 333 U.S. at 519. And numerous recent attempts to restrict violent video games and other materials using a modified obscenity approach have been rejected by the courts. See *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) (“*IDSA*”) (striking down law that restricted video games deemed “harmful to minors,” defined according to the three-part test for obscenity as to minors); *American Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 574–75 (7th Cir. 2001) (“*AAMA*”) (rejecting video game law’s attempt to “squeeze the provision on violence into a familiar legal pigeonhole, that of obscenity”); *Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997) (rejecting attempt to restrict trading cards depicting “heinous crimes” under a harmful to minors standard, holding that “the standards that apply to obscenity are different from those that apply to violence” because “[o]bscenity is not protected speech.”); *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 687 (8th Cir. 1992) (striking down ban on violent videos that incorporated definition for obscenity, holding that law violated First Amendment and was unconstitutionally vague); *Entertainment Software Ass’n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006) (striking down as unconstitutionally vague violent video game law that incorporated three-part harmful to minors standard); *Entertainment Software Ass’n v. Granholm*, 426 F. Supp. 2d 646, 652, 655 (E.D. Mich. 2006) (invalidating violent video game law as vague and not governed by the harmful to minors standard of *Ginsberg*).

There is no reason to expect a different result when it comes to televised violence. In contrast to the age-old concern with limiting depictions of obscene sexual images, “[t]he notion of forbidding not violence itself, but pictures of violence, is a novelty.” *AAMA*, 244 F.3d at 575–76; see also *IDSA*, 329 F.3d at 958; *Webster*, 968 F.2d at 687; *Gulotta*, 134 F.3d at 67; *Granholm*, 426 F. Supp. 2d at 652. Moreover, as a practical matter, the attempt to solve the vagueness problem by using obscenity phraseology does not work. In *Webster*, for instance, the Eighth Circuit held that the terms used in the harmful-to-minors standard had no definite meaning in the context of depictions of violence, such that video dealers could only guess at which videos were subject to the law’s restrictions; 968 F.2d at 687; accord *Foti*, 451 F. Supp. 2d at 836 (striking down as vague a video game statute employing a harmful-to-minors standard, because the statute “fails to provide specific definitions of prohibited conduct: many of its terms, such as ‘morbid interest,’ have no clear meaning; and there is no explanation of crucial terms such as ‘violence’”); *Granholm*, 426 F. Supp. 2d at 648–49, 655–56.

Specifying Particular Depictions. Courts have also rejected attempts to create a workable definition of proscribed “violent” content by enumerating the specific depictions of violence that are forbidden. Thus, in *Granholm*, the Michigan district court held that a law restricting video games containing “graphic depictions of phys-

ical injuries or physical violence against parties who realistically appear to be human beings” was unconstitutionally vague; 426 F. Supp. 2d at 655; see also *Entertainment Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1051, 1077 (N.D. Ill. 2005). These decisions cast serious doubt on the Report’s suggestion that a regulation could be created that restricted only patently offensive depictions of “severed or mutilated human bodies or body parts,” for example. Report ¶42. To begin with, there is no empirical support for the proposition that these depictions are especially harmful as compared with other violent images. Moreover, the terms suggested by the Report are necessarily vague and raise even more questions. For instance, would such a regulation apply to documentaries or news programs demonstrating medical procedures or depicting amputees? What about cartoons showing “severed” body parts, where the fictional character is put back together again? What about news depictions of war or suicide bombings? Would it prohibit the televising of Shakespeare’s plays, such as *King Lear*, which include this type of violence?

Adding Adjectives. Nor does the use of certain adjectives, such as “extensive or graphic” or “realistic,” Report ¶44, solve the vagueness problems. These terms can only leave broadcasters guessing. Does “graphic” include a nature program’s images of a lion killing its prey? What about footage from the Iraq war? And does “realistic” violence include professional football, hockey or boxing telecasts? Does it include humorous footage of a fight shown on *America’s Funniest Home Videos*?² Questions like these have prompted courts to strike down laws using similar adjectives to define the category of violence being regulated. See *Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1190–91 (W.D. Wash. 2004) (lack of clarity as to when a game was “realistic” or when conflict was sufficiently “aggressive”); *Granholm*, 426 F. Supp. 2d at 655 (invalidating a statute restricting video games containing “extreme and loathsome violence”).

Incorporating Voluntary Ratings. Finally, attempting to incorporate the broadcasters’ own voluntary rating system as a way to define what kinds of programs may be regulated would not solve the constitutional problems. The existing rating system is intended as a guide for parents and viewers—not as a basis for government regulation. And incorporating a rating system only raises other constitutional problems, as it improperly delegates government authority to private organizations. Thus, a recent attempt by Minnesota to ban minors from purchasing video games rated “M” or “AO” by the video game industry’s voluntary rating board was struck down because, among other things, it improperly delegated authority to “a private body with no duty to answer to the public.” *Entertainment Software Ass’n v. Hatch*, 443 F. Supp. 2d 1065, 1070 (D. Minn. 2006). And earlier attempts to incorporate the MPAA’s movie rating system into laws regulating speech were similarly invalidated. *E.g.*, *Swope v. Lubbers*, 560 F. Supp. 1328, 1334 (W.D. Mich. 1983); *Engdahl v. City of Kenosha*, 317 F. Supp. 1133 (E.D. Wisc. 1970); *Motion Picture Ass’n of Am. v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970). Further, any requirement that broadcasters submit their programs to a ratings board before they can be screened would be a classic example of a “prior restraint,” which is constitutional in only the most limited circumstances. See, e.g., *Freedman v. Maryland*, 380 U.S. 51, 57–60 (1965).

* * * * *

In short, it is not surprising that the FCC was not able to come up with even a proposal of how to define the violent content to be regulated, as every previous attempt has been rejected by the courts as hopelessly vague and overbroad. This is not simply a matter of a failure of imagination. Rather, it illustrates the inherent problem with having the government try to pick and choose what kind of television shows—or movies or video games or novels—people are permitted to watch or read. As Commissioner Adelstein observed, quoting an article by then-D.C. Circuit Chief Judge Harry Edwards, “any regulation of television violence confronts an inherent tradeoff between precision and effectiveness,” and “any restriction in this area that is neither overbroad nor vague will leave unregulated so much violent programming that it will no longer accomplish a compelling interest.” Report at 32 (statement of Commissioner Adelstein, approving in part and concurring in part) (quoting Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 Nw. U.L. Rev. 1487, 1502–03, 1555 (1995)).

²See Parents Television Council, *Dying to Entertain: Violence on Prime Time Broadcast Television 1998 to 2006* at 8 (Jan. 2007) (citing episode of *America’s Funniest Home Videos* as violent content).

II. Even Apart From the Definitional Issues, Restrictions on Violent Television Programming Would Not Survive Constitutional Scrutiny

Even if Congress somehow managed to define restricted violence in a manner that was neither vague nor overbroad (and as just discussed, it cannot), the restrictions would still be almost certain to fail substantive constitutional scrutiny.

A. Restrictions on violent television programming would be subject to exacting scrutiny by the courts.

As a threshold matter, televised depictions of violence are fully protected speech. The protections of the First Amendment extend to all expressive forms of entertainment. See, e.g., *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). Moreover, violent speech is not one of the few enumerated categories of speech (such as obscenity) that receive no First Amendment protection. It could hardly be otherwise, given the pervasiveness of violence in classic film (*Saving Private Ryan*, *Raging Bull*), theater (*A Streetcar Named Desire*; *Oedipus Rex*), and literature (*War and Peace*; *The Iliad*). Thus, the Supreme Court has stated that, as a general matter, violent speech is “as much entitled to the protection of free speech as the best of literature.” *Winters v. New York*, 333 U.S. 507, 510 (1948). Indeed, even express advocacy of violent action can be regulated under only the narrowest of circumstances. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

The Commission is therefore incorrect that “if properly defined, excessively violent programming, like indecent programming, occupies a relatively low position in the hierarchy of First Amendment values because it is of ‘slight social value as a step to truth.’” Report ¶25 (citations omitted). That is not the law. It follows that any regulation targeting depictions of violence would be content-based, and thus would ordinarily be subject to strict scrutiny. See, e.g., *United States v. Playboy Entm’t Group*, 529 U.S. 803, 813 (2000).³ and laws rarely, if ever, survive strict scrutiny under the First Amendment.⁴

The FCC in its report nevertheless suggests that Congress could validly restrict violent television programming, based on *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). See Report ¶¶22–25. In *Pacifica*, the Supreme Court arguably applied something less than strict scrutiny when it upheld the FCC’s authority to sanction a radio station for its daytime broadcast of an “indecent” monologue; 438 U.S. at 745.⁵ As explained below, restrictions on violent television programming are unlikely to survive even a lower level of scrutiny for a number of reasons. But in any event, *Pacifica* has absolutely no application outside the narrow context of “sexual or excretory speech.” *Id.* at 743. Again and again, the Court has declined to extend *Pacifica* to new factual settings, stressing the narrowness of the case’s holding. See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983); *Sable*, 492 U.S. at 128; *Reno*, 521 U.S. at 875; *Playboy*, 529 U.S. at 815.

Indeed, *Pacifica* itself was careful to emphasize the narrowness of its holding. See *Pacifica*, 438 U.S. at 743. The Court there reasoned that “sexual and excretory speech” is “at the periphery of First Amendment concern,” *id.*, and “offend[s] for the same reasons that obscenity offends,” *id.* at 746. Violent speech fits neither of these descriptions. Far from lying “at the periphery of First Amendment concern,” speech containing violent content is fully protected by the Constitution.

In any event, there are serious reasons to doubt the continuing validity of *Pacifica*’s rationale even in the context of indecency. *Pacifica*, decided in 1978, cited the “uniquely pervasive presence” of broadcast media and stressed that broadcast programming was “uniquely accessible to children.” *Id.* At 748. Today, broadcast programming is far from “unique” in these respects. Of greatest relevance, nearly

³The fact that the goal is to protect minors would not lower the applicable level of scrutiny. See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975); *Sable Commc’ns. of California, Inc. v. FCC*, 492 U.S. 115, 126–27 (1989) (using strict scrutiny to analyze effort to protect children from dial-a-porn messages); *Reno*, 521 U.S. at 868, 879 (“most stringent review” applies to Communications Decency Act’s provisions, including proscription of transmission of “indecent” communications to minors). Outside the extremely narrow context of sexual speech considered “harmful to minors,” see *Ginsberg*, 390 U.S. at 638, the Supreme Court has never held that the interest in protecting children warrants reduced scrutiny.

⁴Indeed, if the government were to define violent programming in a way that discriminated against a particular viewpoint—for example, by restricting the showing only of “glorified” violence—the regulations would be even harder (if not impossible) to justify. See *RAV v. City of St. Paul*, 505 U.S. 377, 391–92 (1992); *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985).

⁵We note, however, that the D.C. Circuit has interpreted *Pacifica* as requiring strict scrutiny, ruling in the context of the FCC’s time-channeling of indecent programming. See *Action for Children’s Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995).

86 percent of television households now receive television via cable, satellite, or broadband provider.⁶ Likewise, widespread Internet access did not take hold until a decade and a half after the Court decided *Pacifica*. The Supreme Court has applied strict scrutiny to attempts to restrict “indecent” speech on both the Internet and cable television. See *Reno*, 521 U.S. at 868, 879; *Playboy*, 529 U.S. at 813. Given the absence of any meaningful difference in the “pervasiveness” or “accessibility” of broadcast television versus these other media, broadcast television must be entitled to the same level of First Amendment protection. In view of the protection the Court has afforded these media, which share the very attributes that *Pacifica* identified, it would likely not extend that case to a new factual setting, such as violence. Cf. *Fox Television Stations, Inc. v. FCC*, No. 06–1760, 2007 WL 1599032, at *17–*18 (2d Cir. June 4, 2007) (describing how *Playboy* and “today’s realities” have undermined *Pacifica*).

Finally, even if *Pacifica* were to remain good law to at least to some extent, the level of review would remain stringent. The Supreme Court has clarified that even *Pacifica* permits speech restrictions only if they are “narrowly tailored to further a substantial governmental interest.” *FCC v. League of Women Voters*, 468 U.S. 364, 380–81 (1984). This level of “intermediate” scrutiny is not easy to satisfy. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665–66 (1994) (“*Turner I*”) (government “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way”). As explained below, legislation restricting depictions of violence on television would fail both intermediate and strict scrutiny.

B. Restrictions on violent programming would fail strict scrutiny.

Under strict scrutiny, to justify any restriction of violent television programming, the government would be required to (1) articulate a compelling state interest; (2) prove that the restriction is “necessary” to serve that interest (*i.e.*, prove that the asserted harms are real and would actually be alleviated by the regulation); and (3) show that the restriction is narrowly tailored, and is the least restrictive alternative available, to serve that interest. *RAV*, 505 U.S. at 395; *Turner I*, 512 U.S. at 664–65. For the reasons set forth below, restrictions on violent programming would fail each prong of the strict scrutiny test.

There are inherent problems with the rationales offered as a basis for regulation of violent content. The FCC Report identified the alleged harm to minors from viewing violent content as the basis for restricting violent television programming. In effect, the Report identifies two different types of harm: an increase in minors’ aggressive behavior, at least in the short term, and an increase in negative (and particularly aggressive) thoughts and feelings. See Report ¶¶ 7–12. While the impulse to protect minors is certainly understandable, neither of these concerns is a legitimate, much less a compelling, basis for the government to restrict protected expression.

The first purported government concern—and a key focus of research cited by the Commission—is that minors will become more aggressive as a result of being exposed to media violence. However, under controlling Supreme Court precedent, the government may not restrict speech in the name of preventing violence unless it can meet the stringent test set by the Court in *Brandenburg*. It is well settled that the government may not restrict speech to prevent violent behavior by recipients except where the targeted expression “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (quoting *Brandenburg*, 395 U.S. at 447) (emphasis added). Lower courts have applied this principle to hold that manufacturers of videotapes and video games containing violent content may not be sued based on the alleged tendency of those materials to encourage violent activities over a long period of time. See *James v. Meow Media, Inc.*, 300 F.3d 683, 699 (6th Cir. 2002); *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264, 1280–81 (D. Colo. 2002). Likewise, in cases challenging the constitutionality of laws restricting violent video games to minors, courts have viewed this “violence-prevention” rationale as illegitimate. See *Blagojevich*, 404 F. Supp. 2d at 1073; *AAMA*, 244 F.3d at 575; *Granholtm*, 426 F. Supp. 2d at 652; *Foti*, 451 F. Supp. 2d at 831; *Maleng*, 325 F. Supp. 2d at 1186–87.

Given that depictions of violence in the media are plainly directed at either informing or entertaining viewers, rather than incitement, and are viewed daily by millions who do not engage in anti-social behavior, it is inconceivable that a court would say they may be regulated as works that are intended to incite imminent law-

⁶See FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Red 2503, 2506 (2006) (Twelfth Annual Competition Report).

lessness and likely to do so. As a result, any effort to justify a law based on the behavioral effects of violent content would have to begin by finding a way to evade the governing legal standard.

The second of the government's purported interests is that children will be become "desensitized" or experience "increased fear" because of exposure to violent images. Report ¶7. Although framed as a concern about "psychological harm" to minors, this justification is essentially an argument that government may restrict speech in order to affect how minors think or feel. However, the notion that protected speech may be restricted because of how it affects the thoughts or personality of listeners is utterly foreign to the First Amendment. As the Supreme Court held in *Ashcroft*, "[t]he government 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.'" 535 U.S. at 253 (quoting *Stanley v. Georgia*, 394 U.S. 557, 566 (1969)); see also *AAMA*, 244 F.3d at 577 (noting "danger of allowing government to control the access of children to information and opinion," as "[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble"). For these reasons, courts have struck down attempts to restrict minors' access to violent video games, finding them to amount to impermissible thought control. See *Foti*, 451 F. Supp. 2d at 831; *Blagojevich*, 404 F. Supp. 2d at 1074.

The social science cited by the FCC and those who support regulation is fundamentally flawed as a justification for restricting speech. Under strict scrutiny, the government has the burden of showing "substantial evidence" of a harm addressed by a speech restriction, that the harm must be "real, not merely conjectural" and the regulation must "in fact alleviate these harms in a direct and material way." See *Playboy*, 529 U.S. at 818, 822; *RAV*, 505 U.S. at 382; *Turner I*, 512 U.S. at 664. The evidence purporting to show that minors are harmed by exposure to depictions of violence is flawed and cannot meet the "substantial evidence" standard.

There are a number of weaknesses in the media violence research on which the FCC Report relies. First, there is little or no evidence of a causal relationship between exposure to media violence and real-world aggressive behavior. Some cross-sectional surveys show a correlation between the two, but "it is impossible to know which way the causal relationship runs: it may be that aggressive children may also be attracted to violent [media]." *Blagojevich*, 404 F. Supp. 2d at 1074. Second, much of the experimental research focuses on proxies for aggression, such as "aggressive play" or noise blasts, rather than evidence of actual real-world aggression. However, there is no established relation between those proxies and a propensity for actual violence. Third, assuming the studies are accurate, the effect sizes they find are quite small, and other risk factors are much more important causes of youth violence. Fourth, even if the studies show some short-term effect on youth aggression, they do not show anything about long-term violence. And, of course, there are additional criticisms of various types of studies. See, e.g., Jonathan L. Freedman, *Television Violence and Aggression: Setting the Record Straight* (2007); Jonathan L. Freedman, *Media Violence and Its Effect on Aggression: Assessing the Scientific Evidence* (2002).

Indeed, the flaws with the media violence research are apparent in the FCC Report. Although the FCC Report reaches the conclusion that "there is strong evidence that exposure to violence in the media can increase aggressive behavior in children, at least in the short term," the Report's discussion of the findings of existing research points to evidence that is far more equivocal. Report ¶5. Indeed, the FCC Report quotes a 2000 Federal Trade Commission report reviewing the relevant research and stating that, while there appeared to be correlation between exposure to media violence and acceptance of violent behavior, "[r]egarding causation . . . the studies appear to be less conclusive," and that "[m]ost researchers and investigators agree that exposure to media violence alone does not cause a child to commit a violent act, and that it is not the sole, or even necessarily the most important, factor contributing to youth aggression, antisocial attitudes, and violence." Report ¶10.

The Report also relies heavily for its conclusions about media violence on a 2001 report issued by the Surgeon General entitled *Youth Violence: A Report of the Surgeon General*, but the FCC Report substantially overstates the Surgeon General's conclusions. The Surgeon General's report does not focus predominantly on media violence nor consider it to be a predominant cause of youth violence. And although the report finds that exposure to media violence is correlated with and may cause short-term aggression, it is circumspect about finding that media violence actually causes real-world violence. In particular:

- The report describes media violence as having a "relatively small effect size[]" on actual youth violence. Chapter 4.

- The report finds that “the preponderance of evidence indicates that violent behavior seldom results from a single cause; rather, multiple factors converging over time contribute to such behavior. Accordingly, the influence of the mass media, however strong or weak, is best viewed as *one of the many potential factors that help to shape behavior, including violent behavior.*” Appendix 4–B (emphasis added).
- The report identifies the unresolved problem of determining *what kinds* of violent media content are actually harmful to minors: “Despite considerable advances in research, it is not yet possible to describe accurately how much exposure, of what types, for how long, at what ages, for what types of children, or in what types of settings will predict violent behavior in adolescents and adults.” Appendix 4–B.
- Ultimately, the report concludes that there is a small effect of media violence on short-term aggression, but not necessarily on long-term propensity to violence. Appendix 4–B.

Additionally, evidence similar to that cited by the Report has been uniformly rejected by courts in the context of challenges to laws restricting violent video games to minors. For example, the Report heavily relies on studies by Dr. Craig Anderson. See Report ¶8. But courts have criticized Dr. Anderson’s and similar work in the context of violent video games as failing to constitute “substantial evidence” of harm to minors. See *AAMA*, 244 F.3d at 578–79; *IDSA*, 329 F.3d at 959; *Blagojevich*, 404 F. Supp. 2d at 1059–63; *Granholm*, 426 F. Supp. 2d at 652–54; *Maleng*, 325 F. Supp. 2d at 1188; *Foti*, 451 F. Supp. 2d at 832; *Hatch*, 443 F. Supp. 2d at 1069–70. In particular, Dr. Anderson’s research was carefully examined and rejected in a case challenging an Illinois video games restriction. In that case, Dr. Anderson testified at trial and admitted that the supposed “effects” of exposure to “violent” video games, if any, are purely correlational, not causal, and are quite small. See *Blagojevich*, 404 F. Supp. 2d at 1060–61, 1063. The same shortcomings identified in Dr. Anderson’s video game research are also present in his general analyses on media violence, on which the FCC relies rather heavily.

An additional body of research cited in the FCC Report—magnetic resonance imaging (“MRI”) brain-mapping studies, primarily the research done by researchers at the University of Indiana—has likewise been debunked during litigation. Federal district courts in both Illinois and Michigan have rejected the governments’ arguments that these studies demonstrate “substantial evidence” of harm to minors. See *Blagojevich*, 404 F. Supp. 2d at 1074; *Granholm*, 426 F. Supp. 2d at 653. Indeed, in the Illinois litigation, one of the Indiana researchers, Dr. Kronenberger, conceded that his research does not show that playing “violent” video games causes the brain patterns observed by his research team. *Blagojevich*, 404 F. Supp. 2d at 1065, 1074. Further, the district court found Dr. Kronenberger’s testimony to be “unpersuasive,” *id.* at 1067, providing “barely any evidence at all, let alone substantial evidence” of the harm claimed by the state. *Id.* at 1074.

Restrictions on violent programming would not be narrowly tailored to materially advance the government’s interest. See *RAV*, 505 U.S. at 395. There are two independent reasons for this.

First, broadcast television represents a relatively small portion of the media to which children are exposed on a day-to-day basis. Among other media, children are exposed to violent content on cable television, satellite television, in motion pictures, in video games, in books and magazines, and via the Internet. Indeed, given that 86 percent of television households receive television from cable, satellite, or broadband providers,⁷ most children may be exposed to violent images simply by changing the channel. See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 744–45 (1996) (plurality opinion of Breyer, J.) (noting that cable television is both pervasive and accessible to children). Regulating broadcasting while leaving other media unaffected suggests not only that broadcasting is being unfairly singled out for adverse treatment from all other media containing violence to which children are exposed, but that the regulation will not actually serve its purpose by leaving other media unaffected. See *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

Second, it is practically impossible for the government to connect the definition of the restricted “violent” programming to specific research identifying what kind of media violence is most likely to cause harm to children. Indeed, even those who believe that media violence can cause aggressive behavior do not necessarily agree about which violent images are more or less harmful. See, e.g., Surgeon General Report, Appendix 4–B. For example, some may regard violence in cartoons or in shows

⁷Twelfth Annual Competition Report, 21 FCC Rcd at 2506.

such as *The Three Stooges* as harmful because they present violence humorously and without obvious consequences, while others believe that cartoons and slapstick comedy are not generally harmful and would instead only be concerned about “realistic” or “graphic” violence. This lack of fit between the definition of restricted “violent” material and any particular evidence of harm demonstrates that the law cannot be narrowly tailored to address the particular “compelling interest” identified by the government, and even an underinclusive regulation would be suspect because it may leave unregulated so much violent programming that it will no longer accomplish a compelling interest.

Restrictions on violent programming would fail strict scrutiny by broadly restricting speech to adults as well as minors. Even a rule restricting the times in which viewers can see violent depictions in television programming would result in the broad suppression of constitutionally protected speech. The Supreme Court has explained that the interest in protecting children from potentially harmful materials “does not justify an unnecessarily broad suppression of speech addressed to adults. . . . [T]he Government may not ‘reduc[e] the adult population . . . to . . . only what is fit for children.’” *Reno*, 521 U.S. at 875.

This is a real concern because 68 percent of the country’s 110 million television-viewing households *do not include children under the age of 18 at all*.⁸ Thus, for the majority of households in the country, restrictions on violent content would do nothing to further the regulation’s goals and would only suppress protected speech. Moreover, adults over the age of 55 spend *more* time watching television than any other age group, and both children ages 2–11 and teens ages 12–17 spend *less* time watching television than any other age/gender group, except men ages 18–24.⁹ The impact of speech-restrictive regulations will be disproportionately felt by adults, not children. And make no mistake, regulating violent content could easily affect an extremely broad range of the most popular mainstream television programming enjoyed by millions of adults. For example, advocates of restricting violent television content have called *ER* the “second-most-violent series on television in the 2005–2006 season,” due to its “medical violence,” and have also consistently cited other top-rated programs, including *C.S.I.*, *Lost*, *Law and Order*, and *Grey’s Anatomy*, as containing problematic violence.¹⁰

The restrictions on violent speech would fail strict scrutiny because they ignore less speech-restrictive alternatives. “If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative. . . . To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit.” *Playboy*, 529 U.S. at 813.

Here, there is no question that there are existing technological tools that enable parents to block access to unwanted programming. The Commission’s principal explanation for the “failure” of V-Chip and similar technology is that parents are unaware that it is available or that they do not know how to use it. *See* Report ¶¶ 29, 32. The Commission further criticizes the rating system for perceived inaccuracies in rating content. *Id.* ¶ 34. But the Commission does not discuss evidence that the proportion of parents who have used the V-Chip specifically has “increased significantly” in recent years (from 7 percent in 2001 to 15 percent in 2004), and the “vast majority” of those parents (89 percent) have said they found it “useful.” Kaiser Family Foundation, *Parents, Media and Public Policy: A Kaiser Family Foundation Survey* (2004) at 7 (61 percent of parents using the V-Chip found it “very useful,” while 28 percent found it “somewhat useful”). By 2006, the proportion of parents using the V-Chip had risen to 16 percent, with nearly three out of four parents (71 percent) who had tried the V-Chip finding it “very” useful, significantly up from 2004, and a “higher proportion than for any of the media ratings or advisory systems.” Kaiser Family Foundation, *Parents, Children & Media: A Kaiser Family Foundation Survey* (2007) at 10.

Further, in 2004, 50 percent of all parents reported using the television ratings to “help guide their children’s television choices,” and the “vast majority” (88 percent) of those parents said that they found the ratings “useful,” including 38 percent who reported the ratings to be “very useful” and 50 percent “somewhat useful.” *2004 Kaiser Report* at 4–5. By 2006, 53 percent of all parents reported using the ratings system, and the percentage who found them “very” useful rose by 11 percentage points to 49 percent. *2007 Kaiser Report* at 9. That these tools are working is reflected in the recent Kaiser study finding that the proportion of parents who say

⁸See Television Watch, “In The Polls,” available at <http://www.televisionwatch.org/news/polls.polls.html>.

⁹Nielsen Media Research, *2007 Report on Television* at 20 (2007).

¹⁰See Parents Television Council, *Dying to Entertain: Violence on Prime Time Broadcast Television 1998 to 2006* at 7, 9–13 (Jan. 2007).

they are “very” concerned that their children are exposed to inappropriate violent content dropped from 62 percent in 1998 to 46 percent in 2006, supporting the Foundation’s conclusion that “parents say they are getting control of their own children’s exposure to sex and violence in the media.”¹¹

Beyond the V-Chip and voluntary ratings system, there are a number of additional technological and other tools that empower parents and viewers. As noted by Commissioner Adelstein, cable subscribers have various options available. Digital cable subscribers can use their set-top boxes to block shows with certain ratings, titles, or by time or date, and analog cable subscribers can use their set-top or “lockbox” technology that blocks specific channels so that they can no longer be viewed. Similarly, satellite television subscribers have access to the Locks & Limits feature on DIRECTV and Adult Guard on Dish Network. Digital and personal video recorders permit families to pre-record and watch selected programming whenever they deem appropriate. See Report at 32 (statement of Commissioner Adelstein, approving in part and concurring in part). Parents can also obtain third-party ratings about the content of specific programs from a number of family and religious organizations.¹²

These findings do not suggest that the best alternative to the V-Chip and other technologies is censorship of speech—on the contrary, they suggest that parents would benefit from educational initiatives regarding existing alternatives and ratings. This was the view of Commissioner Adelstein, who suggesting that existing technologies such as the V-Chip provide “a good basis from which to build,” and who criticized the Report for failing to consider “an education campaign, authorized and funded by Congress, [to] seek to improve consumer awareness and understanding of all existing parental controls technologies and resources, especially the V-Chip and content descriptors.” Report at 34 (statement of Commissioner Adelstein, approving in part and concurring in part). A recent Congressional Research Service report agrees, noting that available research “indicate[s] that increased knowledge of the V-Chip would substantially increase parents’ perceptions of control over their children’s television viewing,” which could be accomplished through “parental awareness programs through, for example, public service announcements on television, educational materials on the FCC website, and possibly public service announcements in print media.”¹³

In fact, NAB, the broadcast networks, the Motion Picture Association of America, the National Cable & Telecommunications Association, the Consumer Electronics Association, DIRECTV and EchoStar, and the Ad Council and others are currently collaborating on a campaign educate parents on how they can better monitor and supervise their children’s television consumption. Broadcast television and radio stations and cable/satellite channels have run and are continuing to run a number of public service announcements (PSAs) about parental controls. These PSAs further direct viewers and listeners to *www.TheTVBoss.org*, where they can learn more about the V-Chip and cable and satellite technologies to better control the television programming coming into their homes.

As the Supreme Court stated in *Playboy*: “It is no response that voluntary [action] requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.” *Playboy*, 529 U.S. at 824. The government may not substitute its judgment for that of parents, including by overriding the decisions of those parents who choose not to use the technology. See *id.* at 825. Indeed, among parents aware of the V-Chip but who have chosen not to use it, 50 percent report that an adult is usually nearby to monitor their children’s television viewing and 14 percent say they “trust their kids to make their own decisions.” *2007 Kaiser Report* at 10. And overall, almost two-thirds (65 percent) of parents report that they “closely monitor” their children’s media use, and another 16 percent feel that they do not need to monitor their children’s media use. *2007 Kaiser Report* at 7. Imposing direct content

¹¹See *2007 Kaiser Report* at 4; Kaiser Family Foundation, News Release (June 19, 2007), available at <http://www.kff.org/entmedia/entmedia061907nr.cfm>. The vast majority of homes can also be presumed to have V-Chip equipped television sets because 82 percent of parents have purchased new television sets since January 2000, when the requirement that all televisions over 13 inches be equipped with a V-Chip went into effect. *2007 Kaiser Report* at 9. Parents with older television sets that lack a V-Chip can separately purchase V-Chip technology to use with existing sets.

¹²See Adam Thierer, *The Right Way to Regulate Violent TV*, The Progress and Freedom Foundation (May 10, 2007), for a thorough discussion of these and additional tools available for parents.

¹³Congressional Research Service, *The V-Chip and TV Ratings: Monitoring Children’s Access to TV Programming*, at 9 (June 4, 2007).

restrictions on television programming would clearly not empower parents (as would a governmental consumer awareness campaign), but would preempt parents by overriding their judgments with the judgment of the government.

In fact, the Supreme Court has previously struck down a time channeling-restriction on certain sexually explicit programming because of the existence of a less restrictive alternative *i.e.*, channel blocking), even though the record before the court showed that “fewer than 0.5 percent of cable subscribers had requested” their cable systems to block the programming in question. *Playboy*, 529 U.S. at 816 (emphasis added); see also *Reno*, 521 U.S. at 879 (legislature must consider even developing technology as less restrictive alternative). That figure is obviously well below the figures for usage of the V-Chip and voluntary program ratings system. Indeed, the Supreme Court has already specifically identified the V-Chip as a type of “less restrictive” alternative for blocking “sexually explicit or violent programs” that renders content-based programming restrictions invalid. See *Denver Area*, 518 U.S. at 756 (content segregation requirements on “patently offensive” programming on leased access cable channels found to violate First Amendment). Further, in passing V-Chip legislation, Congress specifically found that “[p]roviding parents with timely information about the nature of upcoming video programming and with the technological tools that allow them easily to block violent, sexual, or other programming that they believe harmful to their children is a nonintrusive and narrowly tailored means of achieving” the “compelling governmental interest in empowering parents.” Telecommunications Act of 1996, Pub. L. 104–104, §§ 551(a)(8) & (9) (1996).

In short, the widespread availability of a growing number of less restrictive alternatives means that speech-restrictive regulations will be unable to survive strict scrutiny. See *Playboy*, 529 U.S. at 824; *Ashcroft*, 542 U.S. at 666–69; *Blagojevich*, 469 F.3d at 650–51; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507–08 (1996).

C. Restrictions on violent programming would also fail intermediate scrutiny.

In the highly unlikely event that *Pacifica* were determined to remain good law and somehow applicable to regulations of broadcast content outside the context of indecency, restrictions on violent broadcast programming would be valid only if they are “narrowly tailored to further a substantial governmental interest.” *League of Women Voters*, 468 U.S. at 380. Such restrictions would founder under this standard for some of the same reasons that would prevent them from surviving strict scrutiny.

First, the level of scrutiny does not change the government’s obligation to formulate a constitutionally acceptable definition of violent content. *Pacifica* dealt only with “sexual and excretory speech”—that case provides no assistance in adequately defining *violent* content. The problems of vagueness and overbreadth that plague an attempt to define violent content for proscription would not be “cured” because intermediate scrutiny applied. To the contrary, those problems would apply with equal force and would require the invalidation of the legislation for the same reasons outlined above.

Second, even under intermediate scrutiny, the government must still point to a “substantial” interest furthered by the restriction on speech, and must still “demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” *Turner I*, 512 U.S. at 665–66. Further, the regulation must be narrowly tailored, meaning that it must “promote[] a substantial government interest that would be achieved less effectively absent the regulation.” *Id.* At 662 (internal quotation marks omitted). As with strict scrutiny, the government must make these showings with substantial evidence. See *id.* At 665–66. These burdens cannot be met here. To the extent the government’s proffered interests are *illegitimate* (as discussed above), they are no more “substantial” than they are “compelling.” Moreover, as discussed above, the evidence of actual harm is seriously flawed and fails to demonstrate that restrictions on certain broadcasting content will alleviate the purported harm in any direct and material way. Under an intermediate scrutiny analysis, therefore, the lack of an empirical link between televised depictions of various types of violence and harm to children would be fatal to the restrictions.

Third, under intermediate scrutiny, the speech regulation “must not burden substantially more speech than is necessary to further the government’s legitimate interests.” *Turner I*, 512 U.S. at 522 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Here, there is no question that a restriction on certain kinds of content would do just that, by restricting speech to many more adults than children. Further, the available technological and other alternatives make clear that outright speech restrictions would burden more speech than is necessary to further the government’s interest of empowering parents. Indeed, in *Denver Area*, the Supreme

Court held, even assuming *Pacifica* intermediate scrutiny were to apply, that “segregate and block” channel requirements burdened more speech than necessary, given the availability of less-speech restrictive alternatives such as the V-Chip and cable “lockboxes.” *Denver Area*, 518 U.S. at 756, 758–59. In light of the numerous tools available to parents to direct their children’s viewing habits on a household-by-household basis, the same analysis would apply to proposed legislation to restrict the airing of programming containing violent images.

In short, restrictions on violent broadcast programming would be unconstitutional under intermediate as well as strict scrutiny. That conclusion is only bolstered by the novelty of regulating violent content and the virtual impossibility of formulating an appropriate definition of exactly what is restricted.

Conclusion

Particularly at a time when consumers have unprecedented control over the video programming that enters their homes, any legislation restricting broadcast of certain violent television content would impermissibly substitute the government’s judgment for that of parents and interfere with the right of adults to watch what they want. Any such legislation would be fraught with constitutional problems under the First Amendment, and would be very likely to be struck down by the courts.

June 25, 2007

Hon. DANIEL K. INOUE,
U.S. Senate,
Washington, DC.

Dear Senator Inouye:

As representatives of some of the hundreds of program networks that provide a wide variety of diverse programming selections for millions of American consumers, we urge you to oppose government regulation of the packaging and pricing of cable and satellite television programming.

Simple sounding solutions, such as à la carte regulation, are misguided and would not result in the benefits portrayed by its supporters. In fact, such regulation would endanger high quality family-friendly programming available today leaving parents and children with fewer viewing options. Additionally, in an à la carte environment, networks would be forced to spend substantially more money to continuously market their channels, in order to attract a sufficient number of subscribers to survive. Ironically, this may also result in decreased programming budgets, forcing programmers to reduce their investment in original and high quality programming.

Program networks such as ours were developed in response to the increasingly diverse demands and interests of consumers. We provide audiences with a wealth of programming options, including among other things, news and public affairs, religious, Spanish-language and other ethnic programming, family and educational programming, children’s programming, documentaries, sports, music, and general entertainment.

Producing this high quality programming depends on two revenue sources: license fees paid by cable and satellite carriers and advertising sales. This economic model has been tremendously successful in improving both the quality and quantity of television programming available today. Government mandated packaging regulations, and in particular a pay per channel requirement, would undermine this model, cause the demise of many existing networks, and hinder the creation of new ones.

We know from experience that the marketplace spurs innovation and that unnecessary government regulation stifles growth and innovation. Nearly every independent study of this issue has reached the same conclusion—mandatory packaging or à la carte regulation would significantly reduce program diversity, limit consumer choice, and likely increase consumer prices. It would also raise significant First Amendment questions. We therefore respectfully urge you to oppose proposals for such government regulation.

Sincerely,

A&E HD	BBC America	Biography Channel
A&E Network	BBC World	Boomerang
ABC Family	BET	Cartoon Network
Africa Channel	BET Gospel	CMT—Country Music
Animal Planet	BET J	Television
AZN	Big Ten Network	CNN

CNN Airport Network	Fox College Sports	Military History Channel
CNN en Español	Fox Movie Channel	MTV
CNN Headline News	Fox National Cable Sports Networks	National Geographic Channel
CNN International	Fox News	National Geographic Channel HD
Comedy Central	Fox Reality	Nickelodeon
Court TV	Fox Regional Cable Sports Networks	Noggin
Crime and Investigation Network	Fox Soccer Channel	Ovation TV
C-SPAN Networks	Fox Sports en Español	Oxygen
Discovery Channel	Fox Sports Network	PBS Kids Sprout
Discovery en Español	Fuel	Science Channel
Discovery HD Theater	FX	SoapNet
Discovery Health Channel	G4—Videogame Television	SPEED Channel
Discovery Home Channel	Golf Channel	Spike TV
Discovery Kids	Great American Country	Style Network
Discovery Times Channel	HGTV	TBS
Disney Channel	HGTV HD	TLC
DIY Network (Do It Yourself)	History Channel	TNT
E! Entertainment Television	History Channel en Español	TNT HD
ESPN	History International	Toon Disney
ESPN Classic	i-LifeTV—Inspirational Life Television	Travel Channel
ESPN Deportes	INSP—The Inspiration Network	Turner Classic Movies
ESPN HD	La Familia Cosmovision	TV Guide Channel
ESPN2	Lifetime Movie Network	TV Land
ESPN2 HD	Lifetime Real Women	TVG—America's Horseracing Network
ESPNNews	Lifetime Television	Versus
ESPNU	Logo	Versus HD
Fine Living	MHD (MTV HD)	VH1
FitTV	Military Channel	Weather Channel
Food Network		Weatherscan
Food Network HD		

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. INOUE TO
JEFF J. MCINTYRE

Question 1. This month (June 2007) the Kaiser Family Foundation found that only 16 percent of parents have even used the V-Chip. In an earlier report, the Kaiser Family Foundation found that many shows containing violence did not receive a violent content rating. This raises serious questions about whether the V-Chip is an effective way for parents to block shows containing violence. Do you think that the V-Chip is an adequate tool for preventing children from viewing violent programming?

Answer. The V-Chip can be an effective tool for informing parents about inappropriate content and can be adequate for allowing parents to prevent their children from viewing inappropriate material. Unfortunately, there is violent content that is not blocked. Often, material that is not considered violent by an adult is violent from a child's viewpoint (e.g., violent cartoons).

There is also a discrepancy between the various networks as to what constitutes violence for all levels. Consequently, programming rated as violent for one network may escape rating as violent for different network.

In order for more parents to use the ratings, they must be made more consistent, be more consistently applied, and be better marketed to a broader audience.

Question 2. Are you comfortable with the level of violence on television today?

Answer. Through the efforts of the public health community (American Psychological Association, American Academy of Pediatrics, etc.) and the child advocacy community (Children Now, Parent's Television Council, etc.), parents are more aware of the consequences of media violence in their children's lives. With that awareness comes a discomfort with the state of the children's media environment broadly. With a growing amount of violent and sexual material in children's media and a comparatively insignificant amount of children's educational programming, parents need better tools for managing their child's media diet.

Question 3. In 1990, Congress passed the Television Program Improvement Act. It provided antitrust immunity to the television industry to allow the networks to

meet and agree on voluntary programming standards. The networks agreed to note before violent programming, that “due to some violent content, parental discretion is advised.” Is this warning sufficient?

Answer. This warning is not sufficient. In the mid-90s the television industry negotiated an agreement with the public health, child advocacy, and education communities regarding a more detailed ratings system that would give parents more information about the material their children were watching so they could make a healthy decision about their children’s media diet themselves—instead of having it dictated to them by the networks. Broad language, such as “some violent content” does not allow parents to be properly informed about the range of violence that children may be exposed to. There “parental discretion advised” warnings are rarely applied to cartoons with violent content—which can have a significant impact on very young children.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. BILL NELSON TO
JEFF J. MCINTYRE

Question. Much of the hearing focused on violent programming, and what we should do about that. I would like to focus on another source of television violence—the commercials.

Often times, it seems that the commercials contain just as much violence as the actual television programming that they are funding. Furthermore, with commercials, parents have very little control over what their children are seeing. Unlike programming, they don’t know the general content of commercials in advance, and the commercials are not rated or subject to blocking by the V-Chip.

So, I would like to ask the members of the panel—what can we do to help parents who want to control the level of violence in commercials?

Answer. More consistent ratings and a more consistent application of the ratings, along with commercial content consistent with the rating for that program, is what is needed to better control the levels of violence in all programming—commercials included.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. MARK PRYOR TO
JEFF J. MCINTYRE

Question. I believe that one of the problems we will have with the use of the V-Chip is that parents don’t realize the subtle impact that programming has on children, and, therefore, the hassle of using the V-Chip devalues it use. I also think that the current V-Chip technology doesn’t take into account that many families have all household members, of all ages using the same equipment. What is suitable for a five-year old, doesn’t work for your ten-year old, or doesn’t work for the parent.

The V-Chip, to me, would be convenient as a one time process or for a periodical update but not as a daily or weekly tool for parents to employ. Even with the industry’s recent campaign about the availability of the V-Chip, the Kaiser Foundation has found only a modest improvement in the use of the parental block. In 2004, the KFF found that 15 percent of parents have used the V-Chip. In 2007, the KFF found that 16 percent of parents say they have ever used the V-Chip to block objectionable programming.

Although 82 percent of parents now say that they have purchased a new television since January 1, 2000, more than half (57 percent) are not aware that they have a V-Chip. For years, there has been talk about adding the so-called “V” button to the remote of the equipment, but I understand that manufacturers have expressed concern about the cost of adding the button and room for the button on the remote. I brought four remotes with me to the hearing, and they all have lots of buttons but only one—TiVo—offers a parental control button.

I would like to hear from each member of the panel about the strengths and weaknesses of the V-Chip and on the merits of the V-button.

Answer. Foremost, as I am aware, there is no research on a ‘V-Chip button.’ However, parents will benefit from more options being made more readily available. Certainly, the ease of access that a v-chip button’ presents could be a path to that.

The strength of the V-Chip is information. The V-Chip and the television ratings system is designed to put the decision making into the parent’s hands regarding what is most appropriate for their children’s media viewing habits. As each parent knows their own values and children’s needs best—a detailed, easy to use ratings system allows for parents to choose the material they allow in their household—based on their individual child’s needs. This prevents the industry (through broadly

worded, ineffective warnings) and the government (through censorship) from making the decision that the parents are best to make for themselves.

There are several areas of improvement available for the current television ratings system and the V-chip. A few examples of needed areas of improvement follow.

The ratings are not applied consistently. What one network may consider violent at TV-14 does not merit a rating by another.

There is variety in ratings definitions. The amounts of violence, sexual material, and language vary greatly across all ratings and all networks.

The rating of 'FV' for 'fantasy violence' is largely misunderstood. Often applied to cartoons, many viewers have thought this meant 'family viewing.'

Education efforts regarding the V-Chip have been sporadic, during ineffective programming slots, and done mostly in response to political pressure. These ads have also emphasized the age based ratings of the ratings system—while research demonstrates the content based ratings to be the most useful to parents and the most effective in combating violence in the media.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. INOUE TO
TIMOTHY F. WINTER

Question 1. This month (June 2007) the Kaiser Family Foundation found that only 16 percent of parents have even used the V-Chip. In an earlier report, the Kaiser Family Foundation found that many shows containing violence did not receive a violent content rating. This raises serious questions about whether the V-Chip is an effective way for parents to block shows containing violence. Do you think that the V-Chip is an adequate tool for preventing children from viewing violent programming?

Answer. Mr. Chairman, the unfortunate answer is a resounding NO, the V-Chip is not an adequate tool for preventing children from viewing violent programming. Anyone who claims it to be an adequate solution is either fooling themselves or is attempting to fool this Committee.

The fundamental flaw with blocking devices like the V-Chip is that those who are tasked with its success are financially motivated by its failure. Please remember that, in the television industry, the viewer is NOT the true "customer". Rather, the advertiser is the true customer, and the viewer is actually the *product* that the TV network is selling to the advertiser. As such, the networks base their financial performance on audience size and advertiser rates. Anything that would or could reduce either audience size or advertiser rates will reduce the broadcaster's revenue. Because the networks assign content ratings to their own programming, there is an inherent conflict of interest for the programs to be rated accurately. If the programs are not rated accurately, the V-Chip simply cannot function properly. And both parents and advertisers lose.

When the V-Chip was first discussed in the Congress over a decade ago, the television industry denounced it as censorship. They opposed such a system until they were able to find a way to render it wholly ineffective; and having achieved that, now they are pointing to it as a reason why the broadcast indecency laws should be overturned. I cannot urge this Committee in strong enough terms to see through this smoke screen.

The Parents Television Council has published several in-depth reports of the television content rating system. The findings of those reports demonstrate just how broken the system is: Ratings are inaccurate or incomplete up to 80 percent of the time. For example, in the video clips we assembled for this hearing at the request of Senator Rockefeller, one scene depicted a woman snorting heroin from the sliced-open intestines of her dead brother. There was no indicator for violence on this program, which CBS aired at 8 p.m. during the so-called "Family Hour." This type of content rating omission is not an exception; it is the norm on broadcast TV today. In fact there was not one single program airing during primetime broadcast television in the past year was rated for "mature" audiences; 99 percent were either TV-PG or TV-13.

In order for a technology solution like the V-Chip to provide any meaningful assistance to parents and families, the following six (6) points need to be considered:

1. The content ratings must be determined independently, not by those who are financially motivated by its failure.
2. The content ratings must be transparent. In the aforementioned video clip depicting a woman snorting heroin from the sliced-open intestines of her dead brother, would a "V" descriptor be an adequate warning for a parent when a "V" descriptor might also connote a fistfight? Are all "V" scenes equal? Do cer-

tain types of sexual scenes warrant a 'stronger S' rating? The program content must be fully and transparently disclosed if the V-Chip is to be of any real value.

3. There must be a consequence if ratings are intentionally incorrect or misleading. There is no penalty today for the consistent under-rating of content. And if a member of the public seeks to complain about an inaccurate application of a content rating, whom does he or she contact, and how?

4. The ratings system must be consistent, not just across one network but across the entire medium. Our research has shown that the ratings are arbitrarily applied even within the same television network. And the arbitrary nature becomes even worse across other networks, as there is no industry standard on which all the networks base their ratings.

5. Network program promotions and TV commercials must be rated. Each and every day we hear from parents who attempt to make good TV viewing choices for their families, only to be blasted with graphic, gory, gratuitous scenes from the promos of other programs the network is promoting or from the content of TV commercials.

6. The ratings system should be a universal system that crosses all electronic media. Why should parents and families be required to learn one content ratings system for motion pictures, another ratings system for television, yet another ratings system for video games, and other systems still for music lyrics and the internet? There could—and should—be one system for all media.

There is no question that parents need more and better tools to help them control the enormous amounts of graphic content that comes into their homes. The six steps outlined above would be a drastic improvement, but a better technology solution must not lead to the elimination of existing broadcast indecency laws. Even if not legally indecent, parents should have such a resource so they can make better viewing decisions.

Question 2. Are you comfortable with the level of violence on television today?

Answer. No, Mr. Chairman. I am not comfortable with the level of violence on television today. Not only is there more violence on TV today, the depictions of violence are far more realistic and more heinous than ever before. More often those depictions are of sexual violence. And sadly, there is a growing trend to depict children as the victims of graphic violence.

In a major study released earlier this year entitled "Dying to Entertain," the Parents Television Council documented a *75 percent increase in the number of violent instances per hour during prime time between 1998 and 2006*, as well as the major findings listed below. Based on overwhelming amount of violent content chronicled in this report, there is no question that the amount of violence on prime time broadcast television has reached a near epidemic level.

Between 1998 and 2006:

- Violence increased in every time slot:
 - Violence during the 8 p.m. Family Hour has increased by 45 percent.
 - Violence during the 9 p.m. hour has increased by 92 percent.
 - Violence during the 10 p.m. hour has increased by 167 percent.
- ABC experienced the biggest increase in violent content overall. In 1998, ABC averaged .93 instances of violence per hour during prime time. By 2006, ABC was averaging 3.80 instances of violence per hour—an increase of 309 percent.
- Fox, the second-most violent network in 1998, experienced the smallest increase. Fox averaged 3.43 instances of violence per hour in 1998 and 3.84 instances of violence per hour by 2006—an increase of only 12 percent.
- Violent scenes increasingly include a sexual element. Rapists, sexual predators and fetishists are cropping up with increasing frequency on prime time programs like *Law and Order: S.V.U.*, *C.S.I.*, *C.S.I. Miami*, *C.S.I. New York*, *Medium*, *Crossing Jordan*, *Prison Break*, *E.R.* and *House*.

On an hour by hour basis:

- Every network experienced an increase in violence during the 9 o'clock and 10 o'clock hours between 1998 and the 2005–2006 television season.
- ABC experienced the biggest increase in violent content during the Family Hour. In 1998 ABC was the least-violent network, averaging only .13 instances of violence per hour. By 2006, ABC was averaging 2.23 instances of violence per hour, an increase of 1615.4 percent.

- UPN and Fox were the only networks to feature less violence during the Family Hour in 2005–2006 than in 1998. Violence on Fox decreased by 18 percent, and on UPN by 83 percent.
- ABC experienced the biggest increase in violent content during the 9 o'clock hour, jumping from .31 instances per hour in 1998 to 5.71 instances per hour during the 2005–2006 season—an increase of 1,742 percent.
- NBC experienced the biggest increase in violent content—635 percent—during the 10 o'clock hour, from 2 instances of violence per hour in 1998 to nearly 15 instances of violence per hour in 2005–2006.

During the 2005–2006 Season:

- Nearly half (49 percent) of all episodes airing during the study period contained at least one instance of violence.
- The WB network had the highest frequency of violence during the Family Hour during the 2005–2006 season with an average of 3.74 incidents of violence per hour.
- CBS was the most violent network during the 9 o'clock hour during the 2005–2006 season with an average of 7.53 instances of violence per hour.
- ABC's short-lived series *Night Stalker* was the most violent program on television in the 2005–2006 television season. In the sole, one-hour episode that aired during the study period there were 26 instances of violence.
- Every episode of every program airing on NBC in the 10 o'clock hour during the 2005–2006 season contained at least one instance of violence. *On a per-hour basis, NBC's 10 programming averaged an alarming 14.69 instances of violence.*
- 56 percent of all violence on prime time network television during the 2005–2006 season was person-on-person violence.
- For each hour of prime time, CBS had the highest percentage of deaths depicted on screen during the 2005–2006 season. During the 8 o'clock hour, 66 percent of violent scenes depicted a death. During the 9 o'clock and 10 o'clock hours 68 percent of violent scenes depicted a death.
- Across the board, 54 percent of violent scenes contained either a depiction of death (13 percent) or an implied death (41 percent) during the 2005–2006 season.

Question 3. In 1990, Congress passed the Television Program Improvement Act. It provided antitrust immunity to the television industry to allow the networks to meet and agree on voluntary programming standards. The networks agreed to note before violent programming, that “due to some violent content, parental discretion is advised.” Is this warning sufficient?

Answer. The Television Program Improvement Act specifically limited the temporary antitrust exception it created to “any joint discussion for the purpose of . . . developing and disseminating voluntary guidelines designed to alleviate the negative impact of violence in telecast material,” and not merely general programming standards, so it is clear that the problem of television violence has been grappled with by policymakers for decades. This past television season alone featured violent content like a man having a power drill thrust into his back, a finger being severed using a cigar clipper, a bag of heroin being cut out of the bowels of a cadaver, and almost innumerable depictions of violent death and dismemberment.

To answer your question directly, Mr. Chairman, no, this warning is not sufficient. The only way a viewer would see that warning is if they watched the show from its beginning—or—from when the last commercial break ended. With the ubiquity of remote control devices in homes today, hardly a program goes by without “channel surfing” to see what else is on another channel. Consequently, it cannot be argued that a mere 3 second warning prior to the airing of graphic violent content is a sufficient solution to protect children from such programming.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. BILL NELSON TO
TIMOTHY F. WINTER

Question. Much of the hearing focused on violent programming, and what we should do about that. I would like to focus on another source of television violence—the commercials.

Often times, it seems that the commercials contain just as much violence as the actual television programming that they are funding. Furthermore, with commercials, parents have very little control over what their children are seeing. Unlike

programming, they don't know the general content of commercials in advance, and the commercials are not rated or subject to blocking by the V-Chip.

So, I would like to ask the members of the panel—what can we do to help parents who want to control the level of violence in commercials?

Answer. Senator, I wish to thank you for raising this question. It is of critical importance and it reflects the flood of questions and comments we receive each and every day from members of the public across the United States.

First, I think it is important to distinguish (a) commercial advertisements purchased by sponsors, from (b) the promotional advertising the networks run for their own upcoming TV programs. With regard to the former, we are seeing a disturbing trend towards more graphic violence in television commercials, especially for motion picture and video game advertisements. Those commercials tend to highlight some of the most graphic scenes or instances present in the film or game being advertised. Though violent commercials are a concern, we hear far more public outrage at the increased sexual content on television commercials. Clearly violent content and sexual content are both problematic in paid advertising today.

An even greater problem for families is the promotional advertising run by the TV networks to highlight their other upcoming programs. It is common for network promotions highlighting violent programs that typically run in later time slots to be aired earlier in the day, and many 10 p.m. programs are promoted heavily during the 8 p.m. "Family Hour". As a result, promotional spots that show graphically violent scenes are often aired during the prime time hour when children are most likely to be in the audience.

You correctly state that commercials are not rated and are therefore not blockable using the current TV ratings system. Commercials—and network promotions—must be rated in precisely the same manner as the programs being aired if the V-Chip or other blocking devices are to work. But I assure you that the industry will balk at doing anything that might prevent its paying sponsor from having its advertisement blocked by any means. Regardless of ratings, the TV networks must use greater care in the cross-promotion of adult-themed programs.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. MARK PRYOR TO
TIMOTHY F. WINTER

Question. I believe that one of the problems we will have with the use of the V-Chip is that parents don't realize the subtle impact that programming has on children, and, therefore, the hassle of using the V-chip devalues it use. I also think that the current V-chip technology doesn't take into account that many families have all household members, of all ages using the same equipment. What is suitable for a five-year old, doesn't work for your ten-year old, or doesn't work for the parent.

The V-chip, to me, would be convenient as a one time process or for a periodical update but not as a daily or weekly tool for parents to employ. Even with the industry's recent campaign about the availability of the V-chip, the Kaiser Foundation has found only a modest improvement in the use of the parental block. In 2004, the KFF found that 15 percent of parents have used the V-Chip. In 2007, the KFF found that 16 percent of parents say they have ever used the V-Chip to block objectionable programming.

Although 82 percent of parents now say that they have purchased a new television since January 1, 2000, more than half (57 percent) are not aware that they have a V-Chip. For years, there has been talk about adding the so-called "V" button to the remote of the equipment, but I understand that manufacturers have expressed concern about the cost of adding the button and room for the button on the remote. I brought four remotes with me to the hearing, and they all have lots of buttons but only one—TiVo—offers a parental control button.

I would like to hear from each member of the panel about the strengths and weaknesses of the V-chip and on the merits of the V-button.

Answer. Senator Pryor, the PTC favors any tool that is of real help to parents in shielding their children from graphic and explicit content. However, the current TV ratings system and the V-Chip technology that is dependent upon them are of no real use to parents because the producers of TV content rate their own programming. As a result, they have a built-in disincentive to accurately rate shows for fear of losing either audience or advertisers.

Furthermore, research by the PTC and corroborated by the Kaiser Family Foundation and others has demonstrated that the ratings assigned to programming by the networks are inaccurate as much as 60–80 percent of the time. A full two-thirds of programming examined just last year lacked the appropriate content descriptors to warn parents of sexual content, sexual dialogue, violence and coarse

language. So even if parents did exactly what the entertainment industry asks them to do by employing the TV ratings and V-Chip technology, not a single child would have been protected from exposure to the shows that lacked the appropriate content descriptors.

As you point out, in addition to the failings of the industry-controlled ratings system, the technology itself is often difficult to employ. Despite the availability of the V-Chip, the process of activating it differs by each television manufacturer and on each set. That is at least part of the reason why recent polling indicates that only 16 percent of parents had ever used the V-Chip, and far fewer use it on a regular basis. I am intrigued by your idea about a V-Button and would like to understand more.

TiVo is to be commended not only for its one-button approach to parental control technology, but also for TiVo KidZone which enables parents to use a number of third-party ratings systems to find appropriate programs for their children as well as block inappropriate shows. (In full disclosure, we are partners with TiVo on their KidZone feature.)

If the V-Chip and the V-button are to be of any value, the underlying content rating system must be thorough and accurate. There are six (6) critical issues related to the content rating system which must be addressed if any blocking device is to work properly:

1. The content ratings must be determined independently, not by the networks themselves who are financially motivated by its failure;
2. The program content must be fully and transparently disclosed;
3. There must be a consequence if ratings are intentionally incorrect or misleading, and there must be a clear solution in place for public complaint;
4. The ratings system must be consistent, not just across each network but across the entire medium;
5. Network program promotions and TV commercials must be rated;
6. The ratings system should be a universal system that crosses all electronic media: motion pictures, television, video games, music lyrics, internet, etc.

If the television industry as a whole moved toward easier, more effective blocking technology, it would be welcomed by millions of concerned parents.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. INOUE TO
LAURENCE H. TRIBE

Question 1. This month (June 2007) the Kaiser Family Foundation found that only 16 percent of parents have even used the V-Chip. In an earlier report, the Kaiser Family Foundation found that many shows containing violence did not receive a violent content rating. This raises serious questions about whether the V-Chip is an effective way for parents to block shows containing violence. Do you think that the V-Chip is an adequate tool for preventing children from viewing violent programming?

Answer. The V-chip is one of many tools that parents may use to prevent their children from viewing programming that parents deem too violent or otherwise inappropriate. My testimony focused on, and my expertise is limited to, the constitutional validity of proposed programming regulation. For that reason, I cannot offer an informed opinion regarding whether parents and others view the V-chip as “adequate” in some psychological or sociological sense. I can say, however, that the V-chip not only is “adequate” but is indeed preferred *from a constitutional law perspective* because, unlike certain proposed regulations, the V-chip offers parents choice rather than centrally imposing any content-based restriction on the speech that they, their children, or others are free to receive or to communicate.

The fact that parents reportedly do not use the V-chip as frequently as some would like is immaterial to whether the V-chip is a constitutionally preferred tool for parents. Indeed, as I pointed out in my testimony, from a constitutional perspective, alternatives need not be widely used—only available to those who choose to use them—in order to count as “less restrictive alternatives” that render unconstitutional any governmental attempt to directly regulate the speech in question. In the *Playboy* case, for example, the U.S. Supreme Court held that the availability of channel blocking was sufficient to make channel blocking a constitutionally preferred “less restrictive alternative,” even though it was then used by fewer than 0.5 percent of cable subscribers.

I would also point out that the level of V-chip use reported in the Kaiser Family Foundation study does not support imposing additional government regulations that

would abridge First Amendment speech rights. The Kaiser report found that, of parents who have used the V-chip, 89 percent found it useful—including 71 percent who found it “very useful”—in blocking shows they did not want their children to watch. Of parents who have television sets with the V-chip and have not used it, 50 percent say they haven’t used the V-chip because “an adult is usually nearby when [their] children watch TV,” and an additional 14 percent say they have not used the V-chip because they “trust [their] children to make their own decisions.” The report also found that 25 percent of parents have used cable or satellite parental controls other than the V-chip to block content they did not want their children to watch.

Question 2. Are you comfortable with the level of violence on television today?

Answer. I cannot offer a meaningful answer to this question because, as I explained at considerable length in my testimony, I have no idea what you, or any other lawmakers or regulators, might *mean* by the term “violence,” especially in a context where the concern is not so much with “violence” as such as it is with the way in which “violence” is being depicted—whether it is being reported factually or sanitized and/or glorified, whether it is being used to shock or to inform or to entertain or to warn or to frighten, and, more generally, what it is being used to express. Nor is this problem the result of any lack of effort or imagination, on your part or mine. I meant just what I said when I testified that I do not believe anyone is capable of crafting a meaningful definition of what constitutes *impermissible* violence without triggering grave constitutional concerns, especially when one recognizes that laws regulating speech must be particularly clear as well as viewpoint-neutral in order to be constitutional. I do not believe that impermissible violence can be defined in a way that would withstand constitutional scrutiny.

Question 3. In 1990, Congress passed the Television Program Improvement Act. It provided antitrust immunity to the television industry to allow the networks to meet and agree on voluntary programming standards. The networks agreed to note before violent programming, that “due to some violent content, parental discretion is advised.” Is this warning sufficient?

Answer. Whether this particular warning language is “sufficient” to alert a viewer regarding a particular program’s content is obviously outside my area of expertise—although I would note that the Kaiser Family Foundation report found that 89 percent of parents say that current TV ratings have been useful (including 49 percent who say “very useful”) in guiding their families’ viewing choices, and that these warnings are used *in addition to* the program ratings that are recognized by the V-chip. The important point—and the point that is within my expertise—is that truly industry-based and industry-generated (rather than government-based or government-generated) solutions that empower parents to make decisions with respect to the programming their children will view—such as the voluntary warning language quoted above—present no constitutional problem, in sharp contrast to any attempt at direct government regulation of content.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. BILL NELSON TO
LAURENCE H. TRIBE

Question. Much of the hearing focused on violent programming, and what we should do about that. I would like to focus on another source of television violence—the commercials.

Often times, it seems that the commercials contain just as much violence as the actual television programming that they are funding. Furthermore, with commercials, parents have very little control over what their children are seeing. Unlike programming, they don’t know the general content of commercials in advance, and the commercials are not rated or subject to blocking by the V-Chip.

So, I would like to ask the members of the panel—what can we do to help parents who want to control the level of violence in commercials?

Answer. My testimony focused on the constitutional validity of proposed programming regulations. Several of the constitutionally preferred alternatives discussed in my testimony can help parents restrict the access of their children to commercials that they believe contain excessive or otherwise inappropriate or gratuitous violence. These options include (i) using the V-chip or on-screen guides to block programs or channels in which violent commercials have appeared in the past; (ii) subscribing to “family-friendly” programming options such as DIRECTV’s Family Choice Plan, in which such commercials typically do not appear, (iii) permitting children to watch only those programs and commercials that have been pre-recorded with a time-shifting technology such as a VCR or DVR, (iv) using timers that allow televisions to

work only at certain times of the day when such commercials are less likely to appear, and (v) watching television with their children.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. MARK PRYOR TO
LAURENCE H. TRIBE

Question. I believe that one of the problems we will have with the use of the V-chip is that parents don't realize the subtle impact that programming has on children, and, therefore, the hassle of using the V-chip devalues its use. I also think that the current V-chip technology doesn't take into account that many families have all household members, of all ages using the same equipment. What is suitable for a five-year old, doesn't work for your ten-year old, or doesn't work for the parent.

The V-chip, to me, would be convenient as a one time process or for a periodical update but not as a daily or weekly tool for parents to employ. Even with the industry's recent campaign about the availability of the V-chip, the Kaiser Foundation has found only a modest improvement in the use of the parental block. In 2004, the KFF found that 15 percent of parents have used the V-Chip. In 2007, the KFF found that 16 percent of parents say they have ever used the V-Chip to block objectionable programming.

Although 82 percent of parents now say that they have purchased a new television since January 1, 2000, more than half (57 percent) are not aware that they have a V-Chip. For years, there has been talk about adding the so-called "V" button to the remote of the equipment, but I understand that manufacturers have expressed concern about the cost of adding the button and room for the button on the remote. I brought four remotes with me to the hearing, and they all have lots of buttons but only one—TiVo—offers a parental control button.

I would like to hear from each member of the panel about the strengths and weaknesses of the V-chip and on the merits of the V-button.

Answer. From my perspective, and within the limits of my legal expertise, the strengths and weaknesses of the V-chip or V-button turn on whether these tools offer constitutionally valid means to achieve the government's goal of protecting children from certain allegedly "violent" programming. As addressed in my testimony, the V-chip is an effective tool because it permits parents to block programming that they do not want their children to view. The "V-button" may provide another equally effective alternative. The V-chip (or the V-button) may not be used as frequently as some would like, but this does not mean that these tools are ineffective, at least from a constitutional law perspective. Any perceived congressional concerns over how often parents use the V-chip cannot justify the imposition of centralized restrictions on speech—restrictions that, for reasons I explained in detail in my testimony, could not be squared with the First Amendment's strict requirements of narrowness, precision, and viewpoint-neutrality. That said, I think it might be useful for me to point out that the Kaiser report found that, of parents who have used the V-chip, 89 percent found it useful—including 71 percent who found it "very useful"—in blocking shows they did not want their children to watch. Of parents who have television sets with the V-chip and have not used it, 50 percent say they haven't used the V-chip because "an adult is usually nearby when [their] children watch TV," and an additional 14 percent say they have not used the V-chip because they "trust [their] children to make their own decisions." The report also found that 25 percent of parents have used cable or satellite parental controls other than the V-chip to block content they did not want their children to watch.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. INOUE TO
DALE KUNKEL, PH.D.

Question 1. This month (June 2007) the Kaiser Family Foundation found that only 16 percent of parents have even used the V-Chip. In an earlier report, the Kaiser Family Foundation found that many shows containing violence did not receive a violent content rating. This raises serious questions about whether the V-Chip is an effective way for parents to block shows containing violence. Do you think that the V-Chip is an adequate tool for preventing children from viewing violent programming?

Answer. In order for the V-chip to function effectively at limiting children's exposure to sensitive material on television, it is essential that programming be rated accurately. The existing evidence that offers an independent evaluation of the accuracy, or validity, of the television's industry rating practices suggests that many violent programs are "underrated." By this, I mean that applicable content codes, such as "V" for violence, are not applied where they are warranted. There is also evidence

from parent surveys indicating that many parents judge that V-chip ratings applied to programs are often too lenient, and that they would assign more restrictive ratings to the content in question. When parents lack confidence in the accuracy of the ratings, it undercuts the utility of the V-chip system and diminishes its value as an effective tool for addressing concern about children's exposure to television violence.

Question 2. Are you comfortable with the level of violence on television today?

Answer. Not all violence on television is the same in terms of its risk of harmful effects on child-viewers. Because of that axiom, it is important to frame one's concern with the patterns of violent content in a manner that places greater emphasis on the nature of the depictions than on the sheer amount or volume of violent portrayals. Thus, the key question is not simply whether the level of violence on television is high or low, but rather, whether most violence is presented in ways that are likely to contribute to adverse effects from exposure. Evidence from the National Television Violence Study, which examined roughly 10,000 programs over a three-year period, demonstrates that most televised violence is highly formulaic, and that the consistent pattern of portrayals does indeed enhance the risk of harmful effects on children. Given this evidence, I cannot be comfortable with the presentation of violence on entertainment television in the U.S., and indeed harbor substantial concerns about its risk of harmful effects on children.

Question 3. In 1990, Congress passed the Television Program Improvement Act. It provided antitrust immunity to the television industry to allow the networks to meet and agree on voluntary programming standards. The networks agreed to note before violent programming, that "due to some violent content, parental discretion is advised." Is this warning sufficient?

Answer. I should first note that since the advent of the V-chip, the use of warnings or advisories to alert parents to violent material on television is extremely rare. Because of that fact, researchers have not actively pursued studies to determine their impact. My sense is that such warnings would hold limited utility given that the majority of children age 7 and older have television sets in their bedrooms, and frequently view without any parental supervision.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. BILL NELSON TO
DALE KUNKEL, PH.D.

Question. Much of the hearing focused on violent programming, and what we should do about that. I would like to focus on another source of television violence—the commercials.

Often times, it seems that the commercials contain just as much violence as the actual television programming that they are funding. Furthermore, with commercials, parents have very little control over what their children are seeing. Unlike programming, they don't know the general content of commercials in advance, and the commercials are not rated or subject to blocking by the V-Chip. So, I would like to ask the members of the panel—what can we do to help parents who want to control the level of violence in commercials?

Answer. Under the rubric of "commercials," I suspect that you mean to include promotional messages for future programming. While some product commercials may include violent depictions, it is much more common for program promotions to present short excerpts of intense violent scenes as an "attention-grabber" meant to increase audiences for the advertised program. Such material is often included in sports programming viewed by substantial numbers of children, as well as in most other program contexts with the exception of children's programs. Given that most children over the age of 5–6 years spend the majority of their television time watching programs intended for older audiences, there is a significant risk that children will be exposed to violence in these contexts on a regular basis.

No policy exists to assist parents in limiting their children's exposure to violence in non-program content such as commercials or program promotions. In the absence of any such policy, one can only implore the television industry to exercise greater self-restraint in its use of violent depictions to promote programs and other violent media products (e.g., films, video games).

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. MARK PRYOR TO
DALE KUNKEL, PH.D.

Question. I believe that one of the problems we will have with the use of the V-chip is that parents don't realize the subtle impact that programming has on chil-

dren, and, therefore, the hassle of using the V-chip devalues its use. I also think that the current V-chip technology doesn't take into account that many families have all household members, of all ages using the same equipment. What is suitable for a five-year old, doesn't work for your ten-year old, or doesn't work for the parent.

The V-chip, to me, would be convenient as a one time process or for a periodical update but not as a daily or weekly tool for parents to employ. Even with the industry's recent campaign about the availability of the V-chip, the Kaiser Foundation has found only a modest improvement in the use of the parental block. In 2004, the KFF found that 15 percent of parents have used the V-Chip. In 2007, the KFF found that 16 percent of parents say they have ever used the V-Chip to block objectionable programming.

Although 82 percent of parents now say that they have purchased a new television since January 1, 2000, more than half (57 percent) are not aware that they have a V-Chip. For years, there has been talk about adding the so-called "V" button to the remote of the equipment, but I understand that manufacturers have expressed concern about the cost of adding the button and room for the button on the remote. I brought four remotes with me to the hearing, and they all have lots of buttons but only one—TiVo—offers a parental control button.

I would like to hear from each member of the panel about the strengths and weaknesses of the V-chip and on the merits of the V-button.

Answer. In my estimation, the greatest impact of the V-chip lies more in its existence than in its actual use. What I mean by this is that while relatively few parents actively employ it, most parents are aware that it exists. And its existence is likely to serve as a cue or reminder to parents that there are substantial amounts of material on television that are inappropriate for children. It is likely that the advent of the V-chip has increased parents' sensitivity to the need to supervise their children's media exposure, even if they do not choose to exercise that responsibility via the V-chip's blocking technology.

You are likely aware that there is no single uniform protocol for activating the V-chip in the same way across all models of television receivers. Rather, each manufacturer requires different commands in different sequences using different buttons or features on the remote control device to implement the V-chip blocking capability. It typically requires significant user effort, including consulting the product manual, to activate the V-chip technology on most television sets. I have little doubt that V-chip usage by parents would increase significantly if it were possible to utilize the technology simply with the push of a single button that was clearly marked on all TVs and/or remote control devices.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. INOUE TO
PETER LIGUORI

Question 1. This month (June 2007) the Kaiser Family Foundation found that only 16 percent of parents have even used the V-Chip. In an earlier report, the Kaiser Family Foundation found that many shows containing violence did not receive a violent content rating. This raises serious questions about whether the V-Chip is an effective way for parents to block shows containing violence. Do you think that the V-Chip is an adequate tool for preventing children from viewing violent programming?

Answer. The V-Chip is a very effective and powerful tool to aid parents in their efforts to block any unwanted programming, including violence, from coming into the home. It allows parents to block shows based on an age-based rating, such as TV-PG or TV-14, or based on content descriptors, such as "S" for sexual content, "L" for language, or "V" for violence.

According to a survey released by the Kaiser Family Foundation in June 2007, 71 percent of parents who used the V-Chip found the system very useful, clearly demonstrating the blocking tool's effectiveness. Additionally, most parents said that they knew about TV ratings (81 percent) and the V-Chip (70 percent), with one-third of parents understanding the "S" rating, and one-half of parents comprehending the "V" rating.

TV Watch—the leading national organization that promotes parental controls and individual choice as an alternative to increased government regulation of TV content—released additional survey information and data in June 2007 that are worth noting:

- 73 percent of parents monitor what their children watch, including 87 percent of parents whose children are ages 0–10.

- 86 percent of parents believe that more parental involvement is the best way to keep kids from viewing television shows that are rated beyond their ages.
- 83 percent of parents are satisfied with the effectiveness of the V-Chip and other blocking tools.

As this survey shows, one of the most effective and widely-used tools is parental controls.

Finally, it is also important to recognize that the V-Chip is just one of many tools available to parents. Cable and satellite television, subscribed to by roughly 86 percent of U.S. households, offer a wide array of parental controls. With certain set-top devices, parents have the ability to filter content based on TV ratings or MPAA ratings. Parents can also block particular channels, titles, time slots, or even descriptions contained in interactive guides. DIRECTV and Echostar, as well as the top three cable operators, offer “family-friendly” tiers. Parents can use other technological tools and devices to gain access to appropriate content; for example, parents can use Digital Video Recorders (DVRs) to create a library of programs acceptable for their children. An exhaustive list of tools is set forth in a recent survey by Adam Thierer, Senior Fellow and Director, Center for Digital Media Freedom, Progress & Freedom Foundation, “Parental Controls and Online Child Protection: A Survey of Tools and Methods” (A copy of this report is retained in Committee files and is available online at <http://www.pff.org/parentalcontrols/1>).

We understand your concern about the use of content descriptors, and realize there is always room for improvement. In that regard, FOX is currently engaged in an internal review of the process in which it rates TV shows across all of our companies, including the FOX Network, MyNetworkTV, and our cable channels. Moreover, we are working with our broadcast and cable colleagues to improve the consistency of ratings across channels. You have our assurance that we are continually working toward the goal of ensuring that the V-Chip is the most reliable system available.

Question 2. Are you comfortable with the level of violence on television today?

Answer. We believe that the quality of programming on television today is at an all-time high. On FOX, we have a great mix of programming—from family-friendly shows, such as “American Idol” and “Are You Smarter than a 5th Grader?” to compelling, critically-acclaimed dramas, such as “House” and “Prison Break.”

Personally, I am satisfied that the level of violence on television today is carefully measured and labeled by the tools available to assist parents in monitoring their children’s viewing of television programs.

As the parent of a 13-year old and a 15-year old, I personally understand the important role that parents and these tools play. I am constantly evaluating shows to ensure that they are appropriate for my children’s ages and maturity levels. There are shows on television that I simply do not allow them to watch, including shows that FOX airs. The parental control device, such as the V-Chip, is an excellent way for parents to demarcate television viewing by children based on their own particular values and judgments.

Question 3. In 1990, Congress passed the Television Program Improvement Act. It provided antitrust immunity to the television industry to allow the networks to meet and agree on voluntary programming standards. The networks agreed to note before violent programming, that “due to some violent content, parental discretion is advised.” Is this warning sufficient?

Answer. We have learned through ongoing contact with various interest groups that parents find the advisories extremely helpful. We at FOX take seriously our responsibility to use on-screen advisories, as well as many other ways, to inform viewers about the content of our programs. We have a large department of Broadcast Standards professionals, who are charged with ensuring that our shows comply with the law and our own stringent internal standards. These Standards professionals are involved at every step in the development, production and broadcast of our entertainment programming. They meticulously review more than 500 hours of programming and tens of thousands of commercials every year. They are also responsible for rating each episode of every show, providing both an age-based rating, such as TV-PG or TV-14, and content descriptors where necessary (“S” for sexual content, “L” for language, or “V” for violence).

These ratings are aired at the commencement of every program on our networks, and after each commercial break. When appropriate, we also place an additional, full screen advisory at the start of the program to provide a warning to parents to pay close attention before they allow their kids to tune in. Moreover, many television sets and cable satellite set-top televisions provide age-based ratings and content descriptors on the program guides and display screens, even during commercial breaks.

We air public service announcements (PSAs) as part of an industry-wide media campaign that urges parents to take charge of their children's TV viewing. PSAs are run in prime time, during some of our most popular shows, such as "American Idol." This PSA campaign refers parents to a website—*www.TheTVBoss.org*—where we provide detailed information about parental controls and the TV rating system.

We take all these steps to help parents make informed viewing decisions. Together, these actions are very effective.

Question 4. Back in 2004, the National Association of Broadcasters held a Summit on Responsible Programming. As I understand it, this was an effort by broadcasters to take positive steps to address concerns of parents and policymakers about things like violent and indecent programming. What new initiatives came from this exercise? What effect did this effort have on industry efforts to address violent programming?

Answer. Following the Responsible Programming Summit, the National Association of Broadcasters (NAB) and its members, as well as other broadcasters and networks, held a series of meetings to discuss concerns about broadcast programming. A number of those discussions focused on promoting ways for parents to take charge of what their children view on television. As a result of those discussions, individual broadcasters and station groups have focused directly on specific safeguards that could be put in place to prevent inappropriate material from being aired, including delay buttons and other review systems and processes. The Summit resulted in a renewed, voluntary commitment by broadcasters across the country to monitor more closely both their live and recorded content. Today, as result of these efforts and more diligent oversight, there have been few, if any, problems.

Following the Summit, the broadcast industry has examined the history and use of the V-Chip and program ratings system, and has concluded that additional industry efforts should be undertaken to improve consumer awareness of these parental controls. The NAB, broadcast networks, the Motion Picture Association of America, the National Cable & Telecommunications Association, the Consumer Electronics Association, DIRECTV and Echostar, the Ad Council and others joined a campaign to educate parents on how they can better monitor and supervise their children's television consumption. Broadcast television and radio stations and cable/satellite channels have run, and continue to run, a number of PSAs about parental controls. These PSAs further direct viewers and listeners to *www.TheTVBoss.org*, where they can learn more about the V-Chip and cable and satellite technologies to better control the television programming coming into their homes.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. BILL NELSON TO
PETER LIGUORI

Question. Much of the hearing focused on violent programming, and what we should do about that. I would like to focus on another source of television violence—the commercials. Often times, it seems that the commercials contain just as much violence as the actual television programming that they are funding. Furthermore, with commercials, parents have very little control over what their children are seeing. Unlike programming, they don't know the general content of commercials in advance, and the commercials are not rated or subject to blocking by the V-Chip. So, I would like to ask the members of the panel—what can we do to help parents who want to control the level of violence in commercials?

Answer. First of all, our Standards department reviews every commercial before it airs. We review tens of thousands of commercials each year. Moreover, we take into account the product being advertised when deciding what time and on what show it should air.

The Federal Trade Commission (FTC) has also weighed in on the issue of marketing violent entertainment products to children. The FTC has approved guidelines for the television industry, so that no violent entertainment products are marketed on programs where 35 percent or more children are in the audience. We have followed this guideline.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. MARK PRYOR TO
PETER LIGUORI

Question. I believe that one of the problems we have with the use of the V-Chip is that parents do not necessarily recognize the subtle impact of programming on children, and, therefore, the V-Chip is not better utilized. I also believe that the current V-Chip technology does not take into account that many families use the same

equipment for all household members. What is suitable for a five-year old, does not work for a ten-year old, or may not be of interest to an adult.

The V-Chip, to me, would be convenient as a one-time process or for a periodical update but not as a daily or weekly tool for parents to employ. Even with the industry's recent campaign about the availability of the V-Chip, the Kaiser Foundation (KFF) found only a modest improvement in the use of this tool. In 2004, the KFF found that 15 percent of parents installed the V-Chip. In 2007, the KFF found that 16 percent of parents have used the V-Chip to block objectionable programming.

Although 82 percent of parents now say that they have purchased a new television since January 1, 2000, more than half (57 percent) are not aware that their sets have V-Chip technology. For years, there has been talk about adding the so-called "V" button to the remote of the equipment, but I understand that manufacturers have expressed concern about the cost of adding the button and room for the button on the remote. I have brought four remotes with me to this hearing, and they have lots of buttons. Only one button—TiVo—offers parental control. I would like to hear from each member of the panel about the strengths and weaknesses of the V-Chip and on the merits of the V-button.

Answer. The V-Chip has several strengths. First of all, it is ubiquitous. Every television—13 inches or larger manufactured since 2000—is equipped with a V-Chip. While we recognize that there are still televisions in use that were purchased prior to 2000, that number will decrease over time, making V-Chip availability truly universal. Moreover, the V-Chip is easy to program. Once it has been programmed, it will work every time. The strength of the V-Chip is that it allows for parental discretion and flexibility, where parents can block programming based on the aged-based rating system, such as TV-PG or TV-14, or based on content descriptors, such as "V" for violence or "S" for sex. Parents then have the ability to remove V-Chip restrictions when they sit down to watch television programming after their children have gone to bed. We recognize that each household is not the same; some parents, for example, may find subjects related to sex more objectionable than those to violence, or vice versa. The V-Chip gives parents the ability to choose what content their children can and cannot view.

In addition to the V-Chip, parental controls are offered by cable and satellite providers. For example, DirecTV allow parents to block shows based on TV ratings, MPAA ratings, time slots, titles, or channels. Parents also have the ability to block unrated programs and filter objectionable program descriptions on the interactive guide. As I noted in one of my answers above, there is an exhaustive list of technological tools set forth in a recent survey by Adam Thierer of the Progress & Freedom Foundation. Because of the way the V-Chip works, the ratings system cannot be modified without disenfranchising all of the television sets currently in viewers' homes. Any changes could only be incorporated in TV sets sold at some future date.