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Creating a More Child-Friendly Broadcast Media

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CREATING A MORE CHILD-FRIENDLY BROADCAST MEDIA

*Adam Candeub**

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INTRODUCTION

The Dove Foundation, a nonprofit organization with the self-described mission of “encourag[ing] and promot[ing] the creation, production and distribution of wholesome family entertainment”¹ recently completed a study examining the revenue and costs for the 3,000 MPAA-rate theatrical films released between January 1, 1989 and December 31, 2004—a follow-up study of its ten-year study of movies released between 1988 and 1997. The Dove Foundation’s most recent study confirms the findings of its original study: G-rated movies are more profitable than R-rated movies. Dick Rofle, the group’s founder and chairman said, ““While the movie industry produced nearly [twelve] times more R-rated films than G-rated films from 1989 [to] 2003, the

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1. See Dove Foundation, <http://www.dove.org/Frames.asp?URL=partners/families.htm> (last visited July 11, 2005).

average G-rated film produced [eleven] times greater profit than its R-rated counterpart.”²

While some question the study’s findings,³ some argue that the data shows that markets under-provide programming attractive to children and families. For instance, the noted movie critic and social commentator Michael Medved states that: ““For several decades, Hollywood has tried to ignore the increasingly overwhelming evidence that edgy, adult-themed entertainment usually constitutes a bad investment and a sucker bet at the box office. Meanwhile, the Dove Foundation has contributed significantly to making the case that family-friendly fare represents good business”⁴

What makes Medved’s claim difficult to accept from an economic perspective is its assumption that the enormous, multi-billion dollar Hollywood-entertainment complex, with its countless analysts, marketing experts, and, above all, its demanding investors, is run sub-optimally. It would seem that if it really were the case that the Hollywood studios could make more money simply by producing more G-rated films and fewer R-rated, they would. Such totally child-friendly production firms would quickly become the most profitable and attract the largest number of investors.

What would make the Dove Foundation’s research and Medved’s claims more convincing from an economic and legal-regulatory perspective is if they could point to some feature in the structure of the entertainment market that creates the supposed underinvestment. In other words, is there some feature in the entertainment market or its regulation that would induce a perfectly wealth-maximizing firm to under-invest in children and family programming, despite the existence of demand for such programming?

At the same time, Medved and the Dove Foundation’s research do speak to the sense that the demand for child-friendly programming is insufficiently met in the current media environment. Drawing on that sense, we ask that question in the context of advertisement-supported broadcast media,

2. Brian Fuson, *Study: G-rated fare more profitable*, BUSINESS WORLD ONLINE, <http://bworldonline.net/Weekender070105/cinema3.php> (last visited July 11, 2005); see also Dove Foundation, *Profitability of MPAA-Rated Movies for Movies Released Between 1989-2003*, <http://www.dove.org/research/DoveFoundationROI-Study2005.pdf> (last visited July 11, 2005).

3. See, e.g., Peter Johnson, *Stern Says He’ll Push for Kerry*, USA TODAY, July 1, 2004, at D3.; John Dunbar, *Indecency on the Air: Shock-Radio Jock Howard Stern Remains “King of All Fines”*, CTR. FOR PUB. INTEGRITY, Apr. 9, 2004, <http://www.publicintegrity.org/telecom/report.aspx?aid=239&sid=200>; Editorial, *Powell Overreacting to Indecency Issue*, TELEVISION WEEK, Jan. 26, 2004, at 9.

4. Dove Foundation, *supra* note 2, at 11.

examining its market structure—and particularly its extensive regulatory regime—to see whether it could be enhanced to better serve this demand.

In this Essay, I examine current FCC regulation and propose a new approach to encouraging child-friendly broadcast media, drawing on our recent analysis of indecency regulation.⁵ The three major current regulations to protect children—FCC age-specific television programming requirements, obscenity/indecency regulation, and the V-chip media filter for violent programming—have all proved limited tools. Beyond their limited ability to effect real change in programming, they often seem, as I will discuss, more responsive to bureaucratic and political gamesmanship than actual community standards or demand. I, therefore, propose a new, market-based approach.⁶

Broadcasters make their money from advertising; the more viewers or listeners (a.k.a. “eyeballs”) they deliver to advertisers, the more they can charge. Thus, ABC can charge huge amounts for advertising time during the *Super Bowl*, but your local UHF channel can charge significantly less for reruns of *Three’s Company*. The economic transaction is *not only* between broadcasters and consumers, as the traditional regulatory framework assumes, but between consumers’ time (the value of which is pegged to their opportunity costs) and advertisers’ provision of programming via broadcasters.

In economic terms, broadcasting markets display “two-sidedness.” As described by two leading economists, “Two-sided . . . markets are *roughly* defined as markets in which one or several platforms enable interactions between end-users, and try to get the two (or multiple) sides ‘on board’ by appropriately charging each side.”⁷ Thus, broadcasters, in fact, serve two markets: viewers and advertisers at the same time, and success with one group of consumers, i.e., viewers, has positive externalities with the other group, advertisers. Traditional broadcasting regulation concentrates on *one* side of the market. Perhaps as a result, it is the broadcaster who has been able to take sole advantage of the value of the eyeballs, with no advantage to the eyeball owners themselves.

This Article maintains that child-friendly broadcast regulation must take into account *both* sides of the transaction—so as to permit the “eyeball owners”

5. See Keith Brown & Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, BYU L. REV. (forthcoming 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=787928.

6. We provide a more extensive discussion of these issues in *The Law and Economics of Wardrobe Malfunction*.

7. Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: An Overview 2* (Institut d’Economie Industrielle, Working Paper No. 275, 2004), available at http://idei.fr/doc/by/tirole/rochet_tirole.pdf.

to bargain with their advertisers in order to get more than programming in return for listening to their commercials, i.e., to gain a more direct voice in determining programming content. The FCC could easily encourage this mechanism by requiring all programs to explicitly state the entities that advertise and make their addresses/contact information easily accessible, probably on the Internet. In this way, if enough parents and child advocates were sufficiently outraged by certain programming, they could express their displeasure not simply at the broadcaster but *directly* to all companies that support such broadcasting. They could also express to advertisers their desire for more child-friendly programming. The FCC, simply by furnishing and collecting this information, could lower the transaction costs involved for parents and child advocates to communicate and organize and thereby use their bargaining power to deal directly with advertisers for child-friendly programming.

This market-based mechanism could encourage markets to respond to the demand for child-friendly programming—and to the anger that the lack of it induces in many. It could do so with a greatly reduced reliance upon the federal bureaucracy or legal system. Such a market-based mechanism requires advertisers to evaluate parents' and child advocates' complaints and concerns and the threat that they may avoid their products if they support particularly child-unfriendly programming or fail to support child-friendly programming. By gathering and making public information on advertisers, the FCC's role would be analogous to that of the FDA in ensuring the accuracy of food labeling or that of the NEPA's environmental impact regime, which requires disclosure of a project's impact on the environment for the purpose of informing public debate on government activities.

This Essay proceeds as follows. Part I discusses the three main types of broadcast regulation intended to protect children: FCC age-specific television programming requirements, obscenity/indecency regulation, and the V-chip media filter. It will discuss their limitations and propose that they should be altered or augmented. Part II introduces the theory of the two-sided market and explains its application to broadcasting regulation. Further, the Article will discuss how the FCC could make information about advertisers easily accessible to viewers/listeners and **explain** the legal bases for such a regulatory role. The concluding section shows how such an information-based regulatory regime might not only make broadcast media more child-friendly, but also further the goals of civic society.

I. THE THREE MAJOR REGULATORY REGIMES THAT PURPORT TO FURTHER CHILD-FRIENDLY BROADCAST MEDIA: DO THEY REALLY RESPOND TO PARENTS' CONCERNS?

Three major broadcast regulatory regimes are intended to protect children. First, there are the FCC age-specific programming requirements, which encourage children's television programming. Second, there is the obscenity/indecency regulation which prohibits the broadcasting—on publicly licensed television or radio frequency—of certain material involving sexual or excretory functions. Third, the federally mandated V-chip allows parents to screen violent programming.

As discussed below, the first two regimes—mandating children's television programming material and obscenity/indecency regulation—have been politicized significantly and arguably fail to respond effectively to community standards of what is appropriate for children. In fact, all three regimes, including the V-chip, simply attempt to control or limit the production or distribution of broadcast material. They concentrate solely on the viewer-broadcaster relationship rather than create a regulatory structure that is arguably more responsive to consumer demand, as we advocate. This Section will examine these three regimes, pointing to their limited ability to foster a truly child-friendly regime.

A. The Children's Television Act of 1990: Deals and the First Amendment

The Children's Television Act of 1990 (CTA)⁸ has two main requirements. First, cable operators and commercial television broadcast licensees must limit the amount of commercial matter in children's television programming to not more than ten and a half minutes per hour on weekends and not more than twelve minutes per hour on weekdays.⁹ Second, through its review of television broadcast renewal applications, the FCC must consider whether commercial television licensees have "served the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs."¹⁰ The CTA itself did not require any specific amount of time to be devoted to children's television, nor did it define what constitutes children's broadcasting.¹¹ Its initial implementing regulations stated that licensees that

8. Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303a, 303b (1990)).

9. *Id.* at § 303a(b).

10. 47 U.S.C. § 303b(a)(2). *See* 47 C.F.R. § 73.670 (2005).

11. *See* 47 U.S.C. §§ 303a, 303b, 394 (2000).

aired at least one half-hour program per week would receive staff-level approval of the CTA portion of their renewal applications—but never stated with specificity what constitutes children’s programming.¹²

The CTA initially failed completely and, by many accounts, risibly. During its first few years of existence, television stations claimed that reruns of *The Jetsons*, *The Flintstones*, and *Leave It to Beaver* qualified as meeting the educational and informational needs of children.¹³ Similarly, broadcasters claimed that afternoon talk shows discussing sexual topics were serving educational needs.¹⁴ They also scheduled educational programming in the pre-dawn time slots.¹⁵

Seizing upon a mini-initiative, which one supposes was perceiving as having powerful appeal to “soccer moms” and other purportedly vital demographic groups, the Clinton Administration, through its FCC Chairman Reed Hundt, began efforts to strengthen the rules in 1996.¹⁶ Under its new rules, adopted in 1996 and made effective in 1997, the FCC encourages, but does not require, television broadcasters to air three hours of educational children’s programming per week.¹⁷ This “encouragement” works in the following manner: Broadcasters will receive almost automatic approval of the CTA portion of their renewal applications if they air three hours per week of what the FCC terms “core educational programming.”¹⁸ Alternatively, a broadcaster can receive almost automatic renewal by showing that it has aired a package of different types of educational and informational programming that, while containing somewhat less than three hours per week of core programming, demonstrates a level of commitment to educating and informing

12. See *In re Policies and Rules Concerning Children’s Television Programming, Revision of Programming Policies for Television Broadcast Stations*, 8 F.C.C.R. 1841, ¶¶ 6-7 (1993).

13. INST. FOR PUB. REPRESENTATION, GEO. U. L. CTR., A REPORT ON STATION COMPLIANCE WITH THE CHILDREN’S TELEVISION ACT (1992).

14. See Edmund L. Andrews, *Broadcasters, to Satisfy Law, Define Cartoons as Education*, N.Y. TIMES, Sept. 30, 1992, at A13.

15. Robin Schatz, *Tough Crowd Broadcasters struggle to keep the FCC, kids and advertisers happy*, NEWSDAY, Mar. 20, 1994, at 92 (educational programming “aired . . . very early in the morning”).

16. See *In re Policies and Rules Concerning Children’s Television Programming*, 11 F.C.C.R. 10,660, 10,728-33 (1996); see also Reed E. Hundt, *A New Paradigm for Broadcast Regulation*, 15 J.L. & COM. 527 (1996). The new regulations were described as a “compromise agreement . . . brokered by Clinton Administration officials in a long weekend of arm-twisting that preceded . . . [the] children’s television summit at the White House.” Lawrie Mifflin, *U.S. Mandates Educational TV for Children*, N.Y. TIMES, Aug. 9, 1996, at A16.

17. See 11 F.C.C.R. at 10, 728-33.

18. *Id.*

children that is at least equivalent to airing three hours per week of core programming.¹⁹ Licensees not meeting this guideline will be referred to the FCC for consideration, where they will have a full opportunity to demonstrate their compliance with the CTA.²⁰ Given that a broadcaster without a license is out-of-business and quickly becomes a former broadcaster, this encouragement was quite a powerful motivator.

The FCC, in order to avoid the problem of broadcasters claiming *The Jetsons* constitutes education about advanced technology, required that the children's programming be "core programming."²¹ Its requirements defined "core programming" as meeting the following criteria: (1) the program serves the educational and informational needs of children ages sixteen and under as a significant purpose; (2) the educational and informational objective of the program and the target child audience are specified in writing in the Children's Television Programming Report; (3) the program is aired between the hours of 7:00 a.m. and 10:00 p.m.; (4) the program is a regularly scheduled (five days) weekly program of at least thirty minutes in duration; and (6) the program is identified as educational and informational in the Children's Television Programming Report prepared by commercial stations, and those stations must instruct program guide publishers to list the program as educational/informational (E/I).²²

By "encouraging" specific hours to be devoted to educational programming and defining educational programming with some specificity, the new 1996 regulations constituted a dramatic departure from previous enforcement and a significant increase in the regulatory oversight of broadcasters. However, it is far from clear whether, in fact, these regulations have changed things all that much. A 1999 study by the Annenberg Public Policy Center found that one-fourth of programming presented as educational had "no enriching content," which was considered a "modest" improvement over the pre-1990 numbers.²³ This study echoes findings of other researchers that the new rules had no effect on the value of programming and that, in fact, such value decreased after the passage of the new rules. Scholars have noted

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. EMORY H. WOODARD, IV, THE ANNENBERG PUBLIC POLICY CENTER OF THE UNIVERSITY OF PENNSYLVANIA, THE 1999 STATE OF CHILDREN'S TELEVISION REPORT: PROGRAMMING FOR CHILDREN OVER BROADCAST AND CABLE TELEVISION (1999), available at http://annenbergpublicpolicycenter.org/05_media_developing_child/childrensprogramming/rep28.pdf. See also Kevin Harris, *Picture Isn't Bleak for Kid's TV, Study Says*, DENV. POST, June 29, 1999, at A1.

that “investigations of the educational strength of children’s programs, based on evaluations of the primary lessons of E/I programs (e.g., lesson clarity, integration, involvement, and applicability) demonstrated that the educational value of the E/I shows actually declined from the 1996–1997 to the 1998–1999 sample of E/I programs.”²⁴

Indeed, while politicians and FCC officials are eager to take credit for instituting change, they do not seem to have the will to force broadcasters to vigorously—or even sincerely—pursue the goals of the CTA. The FCC has never denied a license renewal or even challenged a station for failing to meet the educational requirements. As Barbara Kreisman, chief of the FCC’s video services division, said, “We don’t like to get involved with issues of quality’ ‘We defer to the judgment of broadcasters’”²⁵

The enforcement of the Children’s Television Act seems to support the dark speculations of former FCC chief economist Thomas Hazlett, that broadcasters’ acquiescence and willingness to support the 1997 rules were in exchange for the free digital spectrum they were given in the late 1990s.²⁶ Consistent with the notion of a deal is that broadcasters never challenged the 1997 rules implementing the CTA in court—despite convincing arguments that these rules run afoul of the First Amendment. The FCC justified these rules, relying on the famous Supreme Court case *Red Lion Broadcasting Co. v. FCC*,²⁷ on the grounds that because broadcast spectrum is scarce, it can be regulated to a much higher degree.²⁸

Courts, however, view specific program requirements, like those contained in the 1997 implementation of the CTA, with great suspicion, and the Supreme Court and lower courts have been distancing themselves from at least a broad reading of *Red Lion*. For instance, the D.C. Circuit has said that requirements for broadcasters to carry specific content, at least under the public interest requirement, create the “high risk that such rulings will reflect the Commission’s selection among tastes, opinions, and value judgments . . . [and] must be closely scrutinized lest they carry the Commission too far

24. Sandra L. Calvert & Jennifer A. Kotler, *Lessons from Children’s Television: The Impact of the Children’s Television Act on Children’s Learning*, 24 J. APPLIED DEVELOPMENTAL PSYCHOL. 275, 279 (2003).

25. Meg James, *TV Networks Find Ways to Stretch Educational Rules*, L.A. TIMES, Feb. 23, 2002, at A1.

26. See Thomas W. Hazlett, *Prime Time: Clinton’s Do-Bad TV Policy*, REASON, Oct. 1996, at 66, available at <http://reason.com/9610/col.hazlett.shtml>.

27. 395 U.S. 367 (1969).

28. See 11 F.C.C.R. at 10,728-33 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969)).

in the direction of the forbidden censorship.”²⁹ Similarly, the Supreme Court has recently said that “the FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations.”³⁰ At the very least, broadcasters probably would have had a close call in the courts if they had challenged the law—but they did not.³¹

B. Indecency: What Do Community Standards Have to Do with It?

The Supreme Court, in the famous *FCC v. Pacifica Foundation* case,³² ruled that the First Amendment permits the FCC to prohibit “indecent” broadcasting, upholding the constitutionality of federal laws—dating from the 1920s—that prohibit the broadcast of “obscene, indecent, or profane” language.³³ It described indecency as “nonconformance with accepted standards of morality” and involving “patently offensive reference to excretory and sexual organs and activities,” but conceded that the concept of indecency “requires consideration of a host of variables.”³⁴

Moving away from the public trustee doctrine, the Court based its upholding of the indecency prohibitions on the grounds that broadcast is uniquely persuasive and “is uniquely accessible to children.”³⁵ Thus, the modern conception of the indecency standard proceeds largely from concern about children.

While the indecency prohibitions no doubt do limit the amount and explicitness of material dealing with excretory and sexual organs on broadcast media, they have proven unstable and highly politicized standards that do not represent a thoughtful policy to protect children or encourage a child-friendly broadcast medium. As discussed elsewhere³⁶ in greater detail, and as outlined below, the political expediency of the moment has motivated the FCC’s indecency policy. It has proven a highly awkward, ineffective, and often destructive tool in protecting children.

29. *Banzhaf v. FCC*, 405 F.2d 1082, 1096 (D.C. Cir. 1968).

30. *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 650 (1994).

31. The Practice Group, *A Discussion of Current Issues in the Practice of Communications Law*, 6 COMMLAW CONSPECTUS 213, 221 (1998) (“We should be very concerned about the whole content regulation aspect from the First Amendment perspective. I’m not sure that if someone had brought a good appeal of the Children’s Television Act it would have passed [c]onstitutional muster.”).

32. 438 U.S. 726 (1978).

33. *See* Radio Act of 1927, Ch. 169, 44 Stat. 1162 (1927) (repealed 1934).

34. *Pacifica*, 438 U.S. at 740, 743, 750.

35. *Id.* at 728.

36. *See generally* Brown & Candeub, *supra* note 5.

Implementing section 1466 of Title 18 of the Criminal Code that prohibits the broadcast of “obscene, indecent, or profane” language, section 73.3999 of the FCC states, “No licensee of a radio or television broadcast station shall broadcast . . . any material which is indecent.”³⁷ The FCC currently defines indecency in the following manner: “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.”³⁸ The Commission uses a community standard that is not region-specific, but reflects “an average broadcast viewer or listener” in the United States.³⁹ The Commission considers the allegedly indecent utterance in context.⁴⁰ In making its indecency determinations, the Commission weighs three factors:

(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.*⁴¹

The FCC itself does not view broadcasts trying to detect indecent material. Instead, its enforcement process depends solely upon complaints received from the public. The FCC requires that these complaints include a tape of the offending program, the date and time of the broadcast, and the call sign of the station involved.⁴² In most instances, the Enforcement Bureau of the FCC will recommend an appropriate disposition. This might involve denial of the complaint, issuance of a “Letter of Inquiry” seeking further information, issuance of a “Notice of Apparent Liability” (NAL) for monetary forfeiture, or a formal referral to the Commissioners (the five political appointees who lead the FCC).⁴³ If the Enforcement Bureau issues an NAL, the licensee may respond to the NAL.⁴⁴ With the response in the

37. 47 C.F.R. § 73.3999 (2005).

38. *In re* Industry Guidance On the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement, 16 F.C.C.R. 7999, 8000 (2001) [hereinafter *2001 Policy Statement*] (citing Enforcement of Prohibitions against Broadcast Indecency in 18 U.S.C. § 1464, 8 F.C.C.R. 704 n.10 (1993)).

39. *2001 Policy Statement*, 16 F.C.C.R. at 8002.

40. *Id.* at 8001.

41. *Id.* at 8003 (emphasis added).

42. *Id.* at 8015.

43. *Id.* See also Brown & Candebub, *supra* note 5 (manuscript at 11).

44. *2001 Policy Statement*, *supra* note 38, at 8016.

administrative record, the FCC then can impose a monetary penalty by issuing a "Forfeiture Order."⁴⁵ If the FCC issues a forfeiture, a licensee can seek reconsideration at the FCC or refuse to pay the fine and challenge the order directly in district court.⁴⁶

The problems with this mechanism are both substantive and procedural. On a substantive level, the standard for indecency is simply too vague for the FCC to administer it in a way that avoids politicization and the resulting arbitrary and unpredictable application of the law. On a procedural level, the complaint process seems designed to allow specific groups to direct the FCC's enforcement policy.

Substantively, the FCC's interpretation of the indecency standard has been guided by politics rather than by any reasoned understanding of indecency or the effects of indecency on children. We discuss the development of this standard in detail elsewhere,⁴⁷ but it is enough to note here its significant steps.

From its creation in 1934 to the early 1970s, the FCC rarely enforced the indecency standards. This changed in the *Pacifica* case. On Tuesday, October 30, 1973, WBAI played a twelve-minute sequence from George Carlin's album "Occupation: Foole" that was about four-letter words and that mentioned the seven words "you couldn't say on the public . . . airwaves."⁴⁸ The Commission received a complaint from a John R. Douglas, who, in the words of the Supreme Court,

stated that he heard the broadcast while driving with his young son, [and] wrote a letter complaining to the Commission. He stated that, although he could perhaps understand the "record's being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control."⁴⁹

John R. Douglas was not a random citizen but was a member of the national planning board of Morality in Media, a conservative political group.⁵⁰ As Lucas Powe argues, Douglas's complaint may have been a calculated effort to achieve certain legal and political aims—not a result of spontaneous listener outrage.⁵¹ Powe points to Douglas's six-week delay in submitting his

45. *Id.* See also Brown & Candeub, *supra* note 5 (manuscript at 12).

46. 2001 Policy Statement, *supra* note 38, at 8016.

47. See Brown & Candeub, *supra* note 5 (manuscript at 19-25).

48. LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 186 (1987).

49. *FCC v. Pacifica Found.*, 438 U.S. 726, 730 (1978).

50. See Brown & Candeub, *supra* note 5 (manuscript at 18).

51. See POWE, *supra* note 48, at 160-210.

complaint and his description of his fifteen-year-old as his “young son” as evidence that Douglas probably did not even hear the broadcast.⁵² Regardless, at that time the FCC was controlled by Republicans appointed by Richard Nixon, and already the conservative religious elements were gaining power within the party.⁵³

However, when the appeal process finally ended and the Supreme Court ruled in 1978, the administration and the bureaucracy had changed. The FCC, now dominated by democratic Carter-appointees, chose a very limited approach to the indecency regulation, merely prohibiting a handful of words—largely those that Carlin satirized in the dialogue that set off the whole case.⁵⁴ Mark Fowler, Reagan’s appointee to the FCC chairmanship, continued this approach, motivated largely by his own ideological de-regulatory conviction.⁵⁵

Under Fowler’s successor, Dennis R. Patrick, however, there was a dramatic shift. The FCC adopted regulations of generalized standards of indecency, which were the direct antecedents of the current rules discussed above. Broadcasters challenged these rules in court, and the Court of Appeals for the D.C. Circuit upheld them in 1995.⁵⁶ At that time, the political climate had shifted yet again, and the rules were returned to an FCC dominated by Clinton appointees.⁵⁷

Under the Clinton presidency and his FCC chairmen, Reed Hundt and William Kennard, there were some decency fines imposed, most notably those directed at Howard Stern, who was fined \$1.7 million in 1995.⁵⁸ The total amounts remained relatively constant, however, with total yearly NALs ranging between \$25,500 and \$49,000 during the second Clinton Administration.⁵⁹ However, with the George W. Bush Administration and the chairmanship of Michael Powell, the indecency enforcements skyrocketed. From the beginning of his term, Powell increased the amount in his first year from \$48,000 to \$91,000.⁶⁰ In 2004, the last full year of his service, the FCC

52. *See id.* at 186.

53. *See id.* at 165-66, 174.

54. *See* Brown & Candeub, *supra* note 5 (manuscript at 18-19).

55. *See id.*

56. *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc).

57. *See* Brown & Candeub, *supra* note 5 (manuscript at 24).

58. *See id.* at 25.

59. Federal Communications Commission, *Indecency Complaints and NALs: 1993-2004* (Mar. 4, 2005), available at <http://www.fcc.gov/eb/broadcast/ichart.pdf>.

60. *Id.*

fined broadcasters an astounding \$7,928,080—more than in the ten prior years combined.⁶¹

What is striking about the Powell enforcements of the indecency regulations—and demonstrative of its substantive weakness—is that they have muddied rather than clarified the scope of language prohibited on broadcast. The FCC is far more interested in responding to political pressure than in crafting clear standards. Consider the Bono case, where the famed singer, during his televised acceptance speech at the Golden Globe Awards, used the phrase “fu--ing brilliant.”⁶²

Under the existing regulations set forth above, the exclamation could not be indecent; it fails all the prongs mentioned above. First, the comment was not “explici[t] or graphic . . . [in the] depiction of sexual or excretory organs or activities.”⁶³ Bono clearly did not use the word “f---” to describe any bodily function, but rather he used it merely to add emphasis to the word “brilliant.”⁶⁴ For better or worse, “fu--ing” in modern usage has a meaning independent from any reference to carnal knowledge. The FCC simply ignored this reality. Second, Bono did not repeat at length descriptions of sexual or excretory organs or activities; his reference to sexual activity—if it was a reference—was fleeting.⁶⁵ Third, Bono’s usage was not titillating or, by most standards, shocking.

The Commission, reversing its own Enforcement Bureau, which found no indecency violation, concluded that Bono’s comment was “indecent.”⁶⁶ First, it stated that the word “fu--ing,” in “any use of that word or a variation, in any context, inherently has a sexual connotation”⁶⁷ Second, the Commission essentially eliminated the requirement that sexual descriptions be repetitive and non-fleeting, stating that, “While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the ‘F-Word’ such as that here are not indecent or would not be acted upon, . . . we conclude that any such interpretation is no longer good law.”⁶⁸ Finally, the Commission

61. *Id.*

62. *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 18 F.C.C.R. 19859, ¶ 2 (2003).

63. *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 F.C.C.R. 4975, ¶ 7 (2004).

64. *See* 18 F.C.C.R. 19859 at ¶¶ 2, 5.

65. *See id.*

66. *See* 19 F.C.C.R. 4975 at ¶ 17.

67. *Id.* at ¶ 8.

68. *Id.* at ¶ 12.

had little trouble declaring that the word fit the third requirement—that of shock or titillation.⁶⁹

Beyond bending the indecency standard into contortions, the Commission also found the term “fu--ing brilliant” to be “profane.”⁷⁰ Historically, drawing on the long accepted legal meaning of “profane,” the Commission had understood the term to refer to blasphemous material—and had not enforced the word in decades.⁷¹ Indeed, the restrictive use of profane to blasphemy is uncontroversial, as its definition in *Black’s Law Dictionary* shows.⁷² The Commission explained its radical departure on the flimsy grounds that nothing in those cases suggests either that the statutory definition of profane is limited to blasphemy, or that the Commission could not also apply a broader definition of profanity adopted once by the Seventh Circuit.⁷³

While the FCC is certainly correct that its precedent never explicitly rejected an expanded notion of “profane,” it would seem that an agency would have to explain *why* it was engaging in such a radical departure in its understanding of its statute, as opposed to merely noting that precedent does not explicitly foreclose the possibility. That the FCC did not do. Combined with its contorted definition of indecency—and the political outcry that accompanied Bono’s comment—the FCC’s action supports what many observers and commentators have concluded: Politics—and not legality—was the FCC’s overriding concern.⁷⁴ This, in turn, suggests that the FCC’s indecency standards do not represent a well thought out policy to protect children.

C. The V-Chip

The 1996 Telecommunications Act mandates that “V-chips” be installed in all television sets “shipped in interstate commerce or manufactured in the United States” that are thirteen inches or larger along the diagonal.⁷⁵ These chips can read ratings embedded in programming content and screen out

69. *Id.* at ¶ 8.

70. *Id.* at ¶ 13.

71. *See id.* at ¶ 14 (“We recognize that the Commission’s limited case law on profane speech has focused on what is profane in the context of blasphemy . . .”).

72. *Black’s Law Dictionary* defines “profane” as “[o]f speech or conduct) irreverent to something held sacred.” BLACK’S LAW DICTIONARY 1246 (8th ed. 2004). While *Black’s* admits that “profanity” can include “[o]bscene, vulgar, or insulting language,” *id.*, section 1464 prohibits “profane” language, not profanity. *See* 19 F.C.C.R. 4975 at ¶ 4.

73. *See* 19 F.C.C.R. 4975 at ¶ 4.

74. *See* Charles Pierce, *Hot Button Issue with the FCC*, B. GLOBE, July 18, 2004, at 9.

75. 47 U.S.C. § 303(x) (1997).

programs with ratings viewers do not want. Thus, for instance, if a program identifies itself as having more violence than the amount set by the viewer, then that program will be blocked. Due to First Amendment concerns, the Act did not mandate broadcasters to label their programming—rather, broadcasters were “persuaded” to do so.⁷⁶

The Telecommunications Act of 1996

create[d] an almost irresistible set of pressures on private industry to create and implement a voluntary ratings system . . . [by requiring] “distributors of video programming” . . . to come up with a workable ratings system acceptable to the FCC, “in consultation with appropriate public interest groups and interested individuals from the private sector.”⁷⁷

Thus, the FCC used its power over its regulated industries, like broadcast and cable, to “voluntarily” adopt a ratings system. The TV ratings system codifies six age levels (Y, Y7, G, PG, 14, MA) with content descriptors (“V” for violence, “S” for sexual situation, “L” for language, and “D” for suggestive dialogue).⁷⁸

The V-chip’s effectiveness has been questioned. As Thomas Hazlett has written, “[T]he joke has always been that mom and dad will be unable to deploy any filtering device that requires programming skills without persuading their 10-year-old to show them how.”⁷⁹ A recent study by the Annenberg Center suggests that the overwhelming majority of families would not use the V-chip even if given extensive technical support.⁸⁰

II. ADVERTISERS AND MEDIA MARKETS

As we discuss elsewhere,⁸¹ the FCC’s focus on content regulation stems from an almost century-old set of assumptions concerning the licensee and the

76. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1544 n.294 (2005).

77. J.M. Balkin, *Media Filters, The V-Chip, and The Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1157 (1996).

78. FCC Fact Sheet, *Cable Television Information Bulletin* (June 2000), available at <http://www.fcc.gov/mb/facts/csgen.html>.

79. Thomas Hazlett, *Requiem for the V-Chip: A relic of the last battle over indecency on TV*, SLATE, Feb. 13, 2004, <http://slate.msn.com/id/2095396>.

80. AMY JORDAN & EMORY WOODARD, THE ANNEBERG PUBLIC POLICY CENTER OF THE UNIVERSITY OF PENNSYLVANIA, *PARENTS’ USE OF THE V-CHIP TO SUPERVISE CHILDREN’S TELEVISION USE* (2003), available at http://annenbergpublicpolicycenter.org/05_media_developing_child/childrensprogramming/2003_Parentsuseofvchip.pdf.

81. See Brown & Candeub, *supra* note 5 (manuscript at 47).

viewer. Broadcast regulation rests on the assumption of government ownership of the airwaves.⁸² Licensees, therefore, can only use spectrum under conditions set forth by the government, conditions that the government enforces.⁸³ This focus is seen in the FCC's regulation intended to protect children, where the FCC regulates broadcasters (or cable companies) for the supposed benefit of viewers. The children's programming requirements, the indecency regulations, even the V-chip all regulate broadcasters for the benefit of the public—with the FCC acting as enforcer in the public interest. Yet, as shown above, FCC regulation does not seem responsive to public interest. Is there another approach that is more responsive to what viewers, in fact, want, rather than one that requires the FCC to attempt to determine what people want?

These regulatory schemes view the broadcaster and viewers in a vacuum, and they fail to consider perhaps the most important factor in the media market: the advertisers. As we describe elsewhere,⁸⁴ broadcasting displays what economists term “two-sidedness.” Firms in two-sided markets face two different sets of consumers, and each set of consumers affects the desirability of the product for the other set of consumers. Consider the retail industry. It is a two-sided market: On one side (the one with which we are most familiar), retailers sell things, such as clothes, TVs, food, etc., to consumers. On the other side, they provide “business” to credit card companies in the form of providing a place where consumers use credit cards.⁸⁵

Similarly, taking into account the relationship of the two sides of the market, a broadcaster generally will optimize over both sides in the following way. The broadcaster charges advertisers an explicit price for commercial time, i.e., a price for a minute of commercial on a given show. A television broadcaster also charges viewers for watching. This price is implicit, as it is the amount of commercial time that viewers endure. This time is not an unquantifiable into price. Rather, it can be priced in a rough way to each viewer's opportunity costs: The value of the opportunities the viewer foregoes in order to watch a commercial is the price he or she pays for a television show.

One simple way to understand the economics of broadcast television is that advertisers pay for programming and bundle commercials with the programming. Viewers pay advertisers for the programming through their

82. *See id.* at 33.

83. *See id.*

84. *See id.* at 45.

85. *See id.*

willingness to watch the commercials. In this sense, the broadcaster is simply a conduit for the exchange between advertisers and viewers.⁸⁶

Comprehending this relationship between broadcasters, viewers, and advertisers enables us to realize that content regulation must not focus exclusively on the relationship between viewers and programmers, but should also include the relationship between viewers and advertisers. After all, as noted above, broadcasters act as the conduit of exchange between advertisers and viewers. Involving advertisers in content regulation may therefore be just as important as—if not more important than—involving broadcasters. In addition, advertisers want viewers who are receptive to their advertisements. To the extent that advertisers can learn which content makes viewers less receptive to their advertisements, advertisers could obtain value from being involved with content regulation.

In other words, if this advertiser information were cheaply supplied, consumers might change their viewing (and purchasing) behavior so as to “punish” advertisers who support indecent programming in a way analogous to consumers refusing to patronize certain restaurants that fail to accept certain credit cards.

The FCC would have the authority to mandate broadcasters to provide information about advertisers who buy commercial time from them under the broad authority of sections 4(i)⁸⁷ and 303(j)⁸⁸ of the Communications Act of 1934. These sections empower the Commission to promulgate general rules for broadcasters and require recordkeeping.⁸⁹

The Commission, in the past, has required broadcasters to keep information about its advertisers pursuant to its program log rules. Indeed, “[s]ome type of program logging requirements have existed virtually since the beginning of broadcast regulation.”⁹⁰ These logs have included advertiser information; broadcasters have kept records, available for public inspection as well as inspection by the FCC, that indicated commercials’

86. See generally Gary S. Becker & Kevin M. Murphy, *A Simple Theory of Advertising as a Good or Bad*, 108 Q.J. ECON. 941 (1993) (demonstrating that this understanding of advertising fits nicely within neoclassical economics).

87. 47 U.S.C. § 154(i) (1996) (“The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”).

88. 47 U.S.C. § 303(j) (1997) (The Commission shall “[h]ave authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable.”).

89. See *id.*; 47 U.S.C. § 154(l) (1997).

90. *In re Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 94 F.C.C.2d 678, ¶ 21 (1983).

“sponsors . . . along with the time devoted to the commercial matter in question.”⁹¹

While the program log requirements were largely lifted in the early 1980s,⁹² the FCC’s authority pursuant to the above-mentioned statutory sections, as well as the broad public trustee obligation, remain and continue to give the FCC the authority to require broadcasters to submit advertiser information. The FCC, itself, could take this information and collate it in a useful form, capable of easy computer search. The FCC has a proven ability to provide the public with large amounts of information in useful formats.⁹³

This information could be provided to consumers in a variety of low-cost ways. As discussed in the following section, in order for this essay’s proposed mandatory information disclosure to be efficient, the costs of providing the information must be sufficiently low. Posting it on the Internet would likely be a sufficiently low-cost way of providing the information. This would be low-cost to the FCC to provide, and would be, in general, low-cost to consumers to access. Consumers could visit the FCC website and, with a relatively simple search, discover which advertisers buy time on which programs across the country. Such information would empower consumers to support those programs and advertisers they like—and punish those advertisers who support programs they do not like.

Posting the information during airtime would likely to be too expensive. On the other hand, with the widespread adoption of digital television, most viewers will have access to digital, real-time television guides, like those provided by Gemstar.⁹⁴ These guides allow viewers, with a few remote control clicks, to access information about the programs they are watching. The FCC could certainly require carriage of advertiser information on these guides.

91. *In re* Petition for Rulemaking to Require Broadcast Licensee to Maintain Certain Program Records, 44 F.C.C.2d 845, ¶ 8 (1974). The programming log rules were found at 47 C.F.R. §§ 73.286, 73.586, 73.670, 73.674 (broadcast), 47 C.F.R. § 73.112 (radio AM-specific rules), and 47 C.F.R. §§ 73.282, 73.582 (radio FM-specific rules).

92. *See In re* Deregulation of Radio, 84 F.C.C.2d 968 (1981) (eliminating program log requirements for radio); *In re* The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1075 (1984) (eliminating program log requirements for television stations).

93. *See generally* Brown & Candeub, *supra* note 5.

94. *See* Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, CS Doc. 97-80, Report & Order, 13 F.C.C.R. 14775 (1998).

CONCLUSION: INFORMATION-BASED REGULATION, COMMUNITY
STANDARDS, AND CIVIC SOCIETY

Numerous political scientists and legal scholars, often identified as “civic republicans,” evaluate laws and/or political systems based on the extent to which such laws/systems encourage discussion of important issues and widespread, broad-based involvement in political dialogue, producing—it is hoped—“civic virtue.”⁹⁵ Such dialogue will help clarify the basic principles of society, producing better principles and, perhaps more importantly, better citizens whom the process improves.

Regardless of one’s views on civic republicanism, it is clear that the current regulatory approach towards protecting children in the broadcast medium retards civic society and civic republican virtues. Interestingly, the FCC regulations that purport to protect children do not encourage discussion about what programming does, in fact, help to foster children’s development. The children’s television programming requirements do not allow parents to express their views or preferences about what types of programming are truly good for their children. The obscenity/indecency regulation purports to be about community standards, yet it is more often about Beltway politics and legal definitions and argument; individuals and individual communities have little to say on the matter. The V-chip makes the question of appropriate programming purely private.

A market-based approach, on the other hand, would encourage and empower discussion about what *should be* policy for making a child-friendly broadcast media. It would lower the costs for citizens to learn about who is supporting what programs, encouraging citizens to use their consumer power to get programming that they want—presumably, programming more attentive and sensitive to children’s needs.

95. See, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541 (1988); Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 18-19 (1986); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985).

