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individualist ideology, the Court's opinions could not bring that issue to the surface.

2. Earl Warren, Thurgood Marshall, and the Jurisprudence of Politicians

Could Brennan's reasonableness be the basis of a constitutional jurisprudence? Again, I think it helpful to see the Warren Court Justices as defending a big Court in a big government. Here the parallelism in phrasing makes a substantive point. The problem for the generation of Justices immediately after 1937 was to work out an account of judicial review in a big government, and the possibility that judicial review should have a narrow scope was always on the table. For those who saw big courts as part of a big government, that possibility was ruled out. What, though, would these big courts do? Just what the rest of the government did: determine sound public policy. Earl Warren's much-cited question, "Is it fair?," n101 captures this untheorized judgment about what judges should do, for no one would contend that in the general case legislatures set out to do the wrong thing or to be unfair. n102

-Footnotes-

n101. See White, supra note 2, at 228 (noting that many attribute this question to Warren but suggesting Warren asked it less frequently than generally believed).

n102. The interpretation of Warren Court jurisprudence I offer rejects the claim that the Court was a process-perfecting or "footnote 4" Court. See generally John H. Ely, Democracy and Distrust: A Theory of Judicial Review (1980). Aside from the analytic difficulties in distinguishing between such a Court and one concerned with making judgments about sound public policy, some of the Warren Court's most distinctive decisions, including Griswold v. Connecticut, 381 U.S. 479 (1965), cannot easily be described as process-perfecting.

-End Footnotes-

Why should judges determine sound public policy after legislatures and executive officials have done so? In discussing Brennan's political skills, I have given the answer the Warren Court Justices gave themselves: They could do the job the politicians had already done because they were themselves politicians. Earl Warren himself is exemplary. He came to the Court after a distinguished public career as governor of California and candidate for the vice-presidency. In that career he had exposed his judgment to the public. The public valued [\*768] dated his judgments by rewarding him with high office. When he was appointed to the Supreme Court, Warren thus believed, the public expected him to continue to do what he had done so well.

Thurgood Marshall understood his role in the same way. As with Brennan, there is a standard law clerk story illustrating Marshall's view. n103 When a law clerk produced a draft reaching a result or relying on a theory with which Marshall disagreed, Marshall would most frequently simply sit on the draft until the law clerk realized that it was not going anywhere. Sometimes, though, Marshall would be explicit. "This is pretty good," he would say, "but you've left out two things." The puzzled law clerk would wonder what legal arguments

had been omitted, what cases overlooked. After a pause, Marshall would point to his commission on the wall: "Nomination by the President and confirmation by the Senate." Nomination and confirmation for Marshall expressed public confidence in the quality of his judgment and embodied the hope that he would continue to exercise that judgment as a Justice. n104

-Footnotes-

n103. This anecdote is based on the personal recollections of the author.

n104. I am reasonably sure that other judges have done something similar. Sometimes, though, the invocation of the commission is designed to show the law clerk who has official authority, rather than to explain why that authority is justified.

-End Footnotes-

Although at this point we begin to deal with quite minor differences among the Warren Court Justices, I believe that Marshall's jurisprudence of judgment differed slightly from Fortas's. n105 I have suggested that Fortas was a legal realist who regarded legal doctrine as decoration that the public, or some other audience, demanded to dress up results. n106 Doctrine had no independent or constraining force for Fortas; it was simply the material he had to use. Marshall, I believe, did think that legal doctrine mattered.

-Footnotes-

n105. I am unsure about the degree to which Warren's jurisprudence was like Marshall's, and Brennan's like Fortas's.

n106. See supra text accompanying notes 29-31.

-End Footnotes-

Marshall's law clerks were familiar with his response to their arguments that he should overlook procedural errors by the lawyer for a sympathetic client: "Rules is rules," Marshall would say. n107 His insistence on rigorous compliance with procedural rules, to the point of true formalism, n108 rested only in part on his recollection that as a practicing lawyer for sympathetic clients, judges had never let him get [\*769] away with loose practices. For, after all, as a judge Marshall was in a position to relax the procedural rigor had he wanted to. But, Marshall believed, lawyers had to follow the rules because the rules constrained judges as much as they did lawyers. n109

-Footnotes-

n107. See, e.g., Thurgood Marshall Papers, Library of Congress, Manuscript Division, box 437, file 8 ("Rules is rules!!" is written in Marshall's hand on motion for relief from procedural requirement in Greene v. Friend of the Court, 484 U.S. 919 (1987) (denying motion to direct clerk to file certiorari petition)).

n108. See, e.g., Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) (Marshall, J.) (holding that clerical error of plaintiff's lawyer's secretary which resulted in failure properly to file notice of appeal barred appeal).

n109. See Elena Kagan, For Justice Marshall, 71 Tex. L. Rev. 1125, 1128 (1993) (recalling Marshall's position that, as an attorney, "you couldn't hope, and you had no right to expect, that a court would bend the rules in your favor").

- - - - -End Footnotes- - - - -

Marshall's impatience with sloppy lawyering reached its peak in Lankford v. Idaho. n110 Lankford's lawyer structured his defense in reliance on a prosecutor's representation that the state would not seek the death penalty. n111 The lawyer did not pin the prosecutor down, however, and the judge indeed sentenced Lankford to death. Marshall's disgust with the lawyer's performance led him initially to vote to affirm the state supreme court's decision upholding Lankford's conviction and sentence. n112 He viewed the case as involving general questions about notice to the defense in criminal cases rather than as a death penalty case. As he initially saw it, the lesson of the case would be that defense lawyers ought not simply to trust their opponents; like everyone else, defense lawyers should get it in writing. Marshall reconsidered his vote only after he was persuaded that the question of notice was inextricably connected to the death penalty issue. n113

- - - - -Footnotes- - - - -

n110. 500 U.S. 110 (1991).

n111. Id. at 120.

n112. Jeffrey Rosen, Court Marshall, New Republic, June 21, 1993, at 14, 14.

n113. Id.

- - - - -End Footnotes- - - - -

The "rules is rules" attitude affected Marshall's performance in death penalty cases in a more subtle way as well. With Brennan, Marshall always dissented from denials of review in death penalty cases. n114 Sometimes Marshall noted that the Court should review the case because it presented some important issue other than the constitutionality of the death penalty. But other times the death penalty was the only substantial issue in the case. n115 Some critics suggested that Brennan and Marshall were somehow flouting the law - that is, the law announced by a firm majority of the Court - in refusing to acknowledge that the death penalty was constitutional. n116 But, for Marshall, the relevant law here was the Constitution itself, not the [\*770] rules announced by his colleagues. In contrast, Marshall never voted to grant a rehearing in a capital case unless, as required by the Court's internal rules (drawn from traditional parliamentary practice), a Justice who had voted the other way now voted for rehearing. n117 Rules were rules, after all.

- - - - -Footnotes- - - - -

n114. For a discussion of this practice, see Jordan Steiker, The Long Road Up from Barbarism: Thurgood Marshall and the Death Penalty, 71 Tex. L. Rev. 1131, 1132 (1993).

n115. See, e.g., *Noland v. North Carolina*, 469 U.S. 1230, 1230 (1985) (Brennan and Marshall, JJ., dissenting from denial of certiorari on ground that "death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments").

n116. For a somewhat different presentation of this material, see Mark Tushnet, *Justice Brennan, Equality, and Majority Rule*, 139 U. Pa. L. Rev. 1357, 1366-69 (1991) (describing Brennan's practice as based on "prudence" and adherence to Constitution itself).

n117. See *id.* at 1368 n.56.

----- -End Footnotes-----

The best doctrinal example of Marshall's concern that doctrine exert some disciplining force on judgment is his equal protection jurisprudence. After a somewhat false start in *Dunn v. Blumstein*, n118 Marshall developed his celebrated "sliding-scale" analysis in equal protection cases. Judges were to take into account the importance of the interest affected and the nature of the classification involved in deciding whether a statute violated the Equal Protection Clause. n119 Throughout his career, Marshall's opinions insisted that these decisions were not unstructured, "all things considered" evaluations; that was more like Powell's approach. Rather, for Marshall, judges could assess the importance of interests and the nature of classifications by the standard techniques of legal analysis; they could draw analogies between one classification and another, and they could determine the relation between an interest directly protected by the Constitution and one not so protected. n120

----- -Footnotes-----

n118. 405 U.S. 330, 360 (1972) (holding that Tennessee statute's residency requirement for voter registration violated Equal Protection Clause of Fourteenth Amendment).

n119. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 102-10 (1973) (Marshall, J., dissenting).

n120. *Id.*

----- -End Footnotes-----

The source of Marshall's concern for the restraining effect of legal doctrine on otherwise unguided judgment is almost too obvious to state. His career as a practicing lawyer imbued him with an ambivalent reverence for the Constitution. Brennan's "rule of five" might have meant that, as Charles Evans Hughes famously put it, the Constitution was what the judges said it was. n121 That was the source of Marshall's ambivalence. He knew from experience that judges too often let their prejudices control their interpretation of the Constitution. Consequently, as his position in death penalty cases showed, Marshall sustained a vision of the Constitution independent of what judges said. It was that Constitution he revered.

----- -Footnotes-----

n121. Charles E. Hughes, Addresses and Papers 139 (The Independent ed., 1908).

- - - - -End Footnotes- - - - -

Conclusion

The narratives of activism and restraint and of rights triumphalism are not entirely inaccurate. n122 I believe, however, that there sim [\*771] ply is too much material that cannot be incorporated into those narratives for them to explain the Warren Court satisfactorily. They have a further deficiency for those interested in biography. Activism and restraint are defined with reference to the immediate legal and political controversies before the Court. Political scientists might find that form of definition acceptable, for they may be interested in how the Court operates as part of a national government. A biographer, though, should seek the roots of a Justice's responses to particular cases at least as much in the Justice's background as in the cases themselves.

- - - - -Footnotes- - - - -

n122. A third common narrative, that of principle and surprise, is also somewhat applicable. This narrative emphasizes the occasions on which a Justice's decisions seem inconsistent with a presumed political orientation and explains the apparent inconsistencies by reference to the Justice's devotion to principle. For a discussion of this narrative, see David O'Brien, Storm Center: The Supreme Court in American Politics 121-25 (3d ed. 1993).

- - - - -End Footnotes- - - - -

Then, however, a second difficulty arises. Academic lawyers and political theorists can pull out of Supreme Court opinions highly sophisticated and well-developed normative visions of the good society. The Justices themselves, though, were not sophisticated political theorists. Indeed, the extent to which the particular expressions in the opinions can be attributed to the Justices is quite unclear - few of the Warren Court Justices drafted the opinions that appeared under their names. n123 Though they usually gave their law clerks general directives about what to include in the opinions, the details - which are the source for the sophisticated elaborations by legal academics and political theorists - were typically produced by the law clerks. From the biographical standpoint, perhaps the best we can do is connect the broad themes articulated in a Justice's opinions to his life and background. So, for example, we might want to explore the connections, if any, between the social teachings of the Catholic Church since the late nineteenth century and Justice Brennan's commitment to the program of the New Deal and the Great Society. Nevertheless, I have some doubt about whether even a sophisticated biographer could rise above the obvious.

- - - - -Footnotes- - - - -

n123. See, e.g., Rosen, supra note 112, at 14.

- - - - -End Footnotes- - - - -

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ARTICLE: REGULATING VIOLENCE ON TELEVISION

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\* Chief Circuit Judge, United States Court of Appeals for the D.C. Circuit. We wish to thank Professor Susan Bloch, Judge Mildred M. Edwards, and Lisa Beattie for their thoughtful critiques of various drafts of this Article. Their comments helped us to sharpen the focus of our arguments. However, they are in no way responsible for any flaws in the final product.

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SUMMARY:

... Many people in American society believe that there is a causal link between viewing violence on television and antisocial violent behavior. ... Insofar as television is concerned, it is surely the case that to isolate and foreground one aspect or theme of a program will influence and change the viewer's experience. ... This means that in situations where a speech restriction only imperfectly advances government's stated interest - and we can anticipate that regulations of televised violence are likely to fall into this category - the compelling interest prong of exacting scrutiny rightly requires only that government's interest in the expected limited realization of its stated objective itself be compelling. ... The analysis therefore proceeds in three steps: (1) is televised violence a causal factor for societal violence? (i.e., would a ban on the former even partially serve the state's interest); (2) what is the magnitude of the causal effect? (i.e., how much societal violence could a given regulation of television violence eliminate); and (3) would the state's interest in such a partial reduction of societal violence be a compelling interest? ... So acceptance of the violence hypothesis does not establish that television violence is harmful to children viewers. ...

TEXT:

[\*1487]

Introduction

Many people in American society believe that there is a causal link between viewing violence on television and antisocial violent behavior. One recent poll revealed that eighty percent of Americans surveyed agreed that "violence on TV shows is harmful to society." n1 This is hardly surprising when one considers some of the truly awful portrayals of violence now shown in gory detail on television and the sheer ubiquity of less graphic presentations. Violence is portrayed as an accepted way of life: weapons are plentiful and people kill each other on a whim, for any reason or no reason at all. Not only is human life not shown to be sacred, the media message is just the opposite: if someone has something you want, take it from him; if he resists, give him a good beating; if he complains or reports you, then destroy his home and family, rape his

girlfriend, and "blow him away." This frightens us, because we now know that

-----Footnotes-----

n1. See 139 Cong. Rec. S5050-52 (daily ed. Apr. 28, 1993) (summary of Times Mirror poll).

-----End Footnotes-----

television is ... a socializing agent almost comparable in importance to the home, school, and neighborhood in influencing children's development and behavior. The medium is a formidable educator, the effects of which are both pervasive and cumulative. Research findings have long since destroyed any illusion that television is merely innocuous entertainment ... ." n2

Thus, many adults wonder whether even good parental guidance can overcome these vile messages from media sources; and many parents fear that, because the trash coming from the media is so pervasive, their children will succumb to the belief that violence is their heritage. The endless news reports of violent crime, especially among young people, tend to confirm these fears.

-----Footnotes-----

n2. David Pearl, Familial, Peer, and Television Influences on Aggressive and Violent Behavior, in Childhood Aggression and Violence 231, 236-37 (David H. Crowell et al. eds., 1987).

-----End Footnotes-----

[\*1488]

People feel justly horrified by the callous disregard for human life - whether seen in the movies, on television, or in the streets - and are weary of media attempts to market violence for a profit. Indeed, some would say that, even if social scientists failed to demonstrate a direct link between media violence and human behavior, it is morally harmful to expose viewers, especially young viewers, to extreme violence. These concerns prompt many calls for action. And in the past two years, the public fervor reawakened congressional concern over the extent and manner of televised portrayals of violence: a slew of bills and resolutions intended to combat television violence floated through the 103rd Congress. n3 Even Hollywood has joined the fray, with the release of Natural Born Killers, a 1994 Oliver Stone movie "about two psychopaths on a killing spree and their avaricious exploitation by the news media, which turn them into pop icons." n4 The movie has been widely touted as "social satire rather than a drama about two killers." n5

-----Footnotes-----

n3. See Stephen J. Kim, Comment, "Viewer Discretion is Advised": A Structural Approach to the Issue of Television Violence, 142 U. Pa. L. Rev. 1383, 1394-95 & nn.43-49 (1994) (detailing seven of the bills).

n4. Bernard Weinraub, How a Movie Satire Turned Into Reality, N.Y. Times, Aug. 16, 1994, at C15.

n5. Id.

- - - - -End Footnotes- - - - -

Congress has devoted close attention to the issue of television violence on several occasions since television's widespread introduction in the early 1950s. n6 These ventures yielded innumerable hearings and three compendious government reports on the linkage between portrayals of violence in the media and antisocial violent behavior. n7 Until recently, however, Congress has taken no serious legislative actions to combat televised violence. The debate around televised violence seems to have escalated in recent years, in part because of society's growing impatience with increasing incidents of violent crime. The media is an easy target, especially since it portrays so [\*1489] much violence, and also because increasing reports from social scientists equate portrayals of violence in the media with misanthropic violent conduct. Regulation of the media seems inevitable to some; the many bills recently offered in Congress reflect this view. Although several of the bills only call for further study or are otherwise of limited direct effect, n8 others would materially affect the presentation of violence on television.

- - - - -Footnotes- - - - -

n6. A thorough history of the federal government's concern with violence on television through the early 1980s is presented in Willard D. Rowland, Jr., *The Politics of TV Violence: Policy Uses of Communication Research* (1983). For a brief overview in the legal literature, see E. Barrett Prettyman, Jr. & Lisa A. Hook, *The Control of Media-Related Imitative Violence*, 38 Fed. Comm. L.J. 317, 320-26 (1987).

n7. See *Violence and the Media: A Staff Report to the National Commission on the Causes & Prevention of Violence* (Robert K. Baker & Sandra J. Ball eds., 1969) [hereinafter *Violence & the Media*]; *National Inst. of Mental Health, Television and Behavior* (David Pearl et al. eds., 1982) [hereinafter *Television & Behavior*]; *The Surgeon General's Scientific Advisory Comm. on Television and Social Behavior, Television and Growing Up: The Impact of Televised Violence* (1972).

All three reports affirmed some causal connection between television violence and antisocial aggression. However, the 1969 and 1972 reports in particular exhibited the ambivalent and highly qualified texture of most large politicized committees and are therefore difficult to summarize. Indeed, the *New York Times* first read the 1972 report to conclude that television violence was unharmful. See Prettyman & Hook, *supra* note 6, at 324 n.24.

n8. E.g., "Parents Television Empowerment Act," H.R. 2756, 103d Cong., 1st Sess. (1993) (directing FCC to establish toll free number to allow for viewer complaints regarding violent programs); "Presidential Commission on TV Violence and Children Act," H.R. 2609, 103d Cong., 1st Sess. (1993) (establishing commission to propose solutions to limiting television violence); "Television Violence Report Card Act," H.R. 2159, 103d Cong., 1st Sess. (1993) (directing FCC to issue public reports evaluating programs for violent content and identifying their sponsors); S. 973, 103d Cong., 1st Sess. (1993) (same); S. 1556, 103d Cong., 1st Sess. (1993) (requiring broadcasters and cable operators to maintain records of commercials and promotional announcements better to enable viewers to complain about excessive violence); see also "Federal

Advertisement Reform Act," S. 2136, 103d Cong., 2d Sess. (1994) (prohibiting federal government from advertising on programs with excessive violence).

- - - - -End Footnotes- - - - -

The legislative proposals with the most bite fall into four general categories: (1) banning or zoning; (2) balancing; (3) labelling; and (4) user blocking. The first of these proposals would involve either a ban of certain types of violent programming from television entirely or, alternatively, a permissible zone of time during which such programs could be shown out of children's viewing hours. n9 The second approach would require programmers to provide balanced programming by offsetting violent shows with nonviolent ones. n10 The third proposal would direct programmers to disclose the violent content of individual shows to viewers by means of violence advisories. n11 And the final proposal would require television manufacturers to install circuitry in new sets that would enable viewers to block out violent programs at their individual discretion. n12

- - - - -Footnotes- - - - -

n9. See "Children's Protection from Violent Programming Act," S. 1383, 103d Cong., 1st Sess. (1993) (prohibiting distribution of violent programming during children's viewing hours); "Television and Radio Program Violence Reduction Act," H.R. 2837, 103d Cong., 1st Sess. (1993) (requiring FCC to promulgate rules directing broadcasters and cable operators to reduce violent programming, such rules to be enforced by fines and revocation of broadcast or satellite licenses).

n10. Although research has revealed no pending bills that specifically require balanced presentations of violence, the FCC has previously mandated balanced coverage of issues of public importance under the Fairness Doctrine. See infra note 85.

n11. See H.R. Res. 202, 103d Cong., 1st Sess. (1993) (obligating broadcasters and cable operators to provide parental advisories throughout programs with explicit violence); S. Res. 122, 103d Cong., 1st Sess. (1993) (same); "Children's Television Violence Protection Act," S. 943, 103d Cong., 1st Sess. (1993) (directing FCC to require violence advisories by broadcasters and cable operators).

n12. See "Television Violence Reduction Through Parental Empowerment Act," H.R. 2888, 103d Cong., 1st Sess. (1993); S. 1811, 103d Cong., 2d Sess. (1994). Rep. Markey's much-discussed "V-Chip" proposal is discussed infra notes 112-14 and accompanying text.

- - - - -End Footnotes- - - - -

[\*1490]

Notwithstanding the moves afoot to curb portrayals of violence in the media, skeptics abound. Some question the validity of the social science studies that purport to show a positive relationship between media portrayals of violence and antisocial conduct. They point out that "the causes of behavior are complex and are determined by multiple factors, and the viewing of televised violence is only one in a constellation of determinants or precipitating factors involved in antisocial or aggressive behavior." n13 Others argue that, even if a

relationship between media violence and antisocial conduct exists, Congress will never devise a viable way to regulate the media, because offending "violence" defies definition. Finally, constitutional purists contend that, whether or not a relationship exists, regulation of the media to deal with this problem is impermissible under the First Amendment.

-Footnotes-

n13. Pearl, supra note 2, at 238.

-End Footnotes-

This Article examines whether any of the aforementioned forms of regulation n14 are consistent with the First Amendment. n15 Only a few legal commentators have given this question the serious attention it warrants. n16 Krattenmaker and Powe's exhaustive and thoughtful article is particularly noteworthy. However, the expansion of social science data over the past fifteen years significantly undermines their skepticism regarding whether television violence causes antisocial aggression. Additionally, the marked evolution of First Amendment doctrine requires fresh legal analysis.

-Footnotes-

n14. For purposes of constitutional analysis, we do not distinguish between legislative and agency action. If, for example, it would be unconstitutional for Congress directly to ban television violence on Saturday mornings, there is no good reason to believe that the FCC could effect the same result through its licensing procedures. This point is persuasively argued in Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 Va. L. Rev. 1123, 1261 n.823 (1978).

This Article does not examine the question of tort recovery, a subject that has already drawn considerable coverage in the legal literature. See, e.g., Prettyman & Hook, supra note 6; Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting From Media Speech: A Comprehensive First Amendment Approach*, 34 Ariz. L. Rev. 231 (1992); Emily Campbell, *Comment, Television Violence: Social Science vs. The Law*, 10 Loy. Ent. L.J. 413 (1990); Anne K. Hilker, *Note, Tort Liability of the Media for Audience Acts of Violence: A Constitutional Analysis*, 52 S. Cal. L. Rev. 529 (1979); Steven J. Weingarten, *Note, Tort Liability for Nonlibellous Negligent Statements: First Amendment Considerations*, 93 Yale L.J. 744 (1984).

n15. "Congress shall make no law ... abridging the freedom of speech, or of the press ...." U.S. Const. amend. I.

n16. See, e.g., James A. Albert, *Constitutional Regulation of Televised Violence*, 64 Va. L. Rev. 1299 (1978); Krattenmaker & Powe, supra note 14; Dennis L. deLeon & Robert L. Naon, *Note, The Regulation of Televised Violence*, 26 Stan. L. Rev. 1291 (1974); Kim, supra note 3.

-End Footnotes-

The age when courts and commentators could debate whether the First Amendment constituted an "absolute" barrier to government regulation of speech n17 is long gone. In its place stands a complex set of rules that directs a

reviewing court to consider such diverse factors [\*1491] as the form and effect of the regulation, the purposes of the regulators, the value of the speech regulated, and the type of media involved. It is no mean task to sort out the law in this area, and in preparing this Article, we often wondered why we had ventured into this constitutional thicket.

-Footnotes-

n17. For a sample of the "absolutist" - "balancing" debate of the 1960s, see Gerald Gunther, In Search of Judicial Quality on a Changing Court: The Case of Justice Powell, 24 Stan. L. Rev. 1001 (1972); Harry Kalven, Jr., Upon Rereading Mr. Justice Black on the First Amendment, 14 UCLA L. Rev. 428 (1967).

-End Footnotes-

The focus of this Article will be regulations relating to portrayals of violence on television. We make no serious effort to deal with portrayals of violence in newspapers, magazines, books, videos, or movies. Although a number of common issues relate to all media forms, television is unique in several important respects: (1) television has long been the focus of attention of regulators and social scientists, so there is more useful data to consider; (2) society has tended to assume that television more likely involves a "captive audience," especially among children, than other forms of media; (3) newspapers and magazines, more often than not, are principally involved in "news reports" of violence; (4) constitutional caselaw has traditionally allowed more regulation of broadcast television than of other media forms; and (5) television has less well-established traditions of "self-regulation" than the movie industry. In short, because these differences pose some analytical problems, the better part of wisdom caused us to limit the focus of this Article to television violence.

The Article is divided into five parts. In Part I we examine whether the level of scrutiny applied to regulations of television violence should be less than would apply generally to other media under the First Amendment. The Supreme Court has long held that those awarded scarce and valuable licenses to broadcast in the electromagnetic spectrum enjoy lesser constitutional protection against government regulation. We question this view, concluding that the justifications offered to distinguish broadcast media from other media - and especially distinguishing broadcast and cable television - do not hold.

Part II invokes the centerpiece of contemporary First Amendment doctrine - the distinction between content-based and content-neutral speech restrictions. Our review of the legal landscape suggests that, although some close questions arise, generally the banning, zoning, balancing, and labelling proposals are content-based regulations; most proposals mandating the installation of lock-out technology, however, can be written to be content-neutral. Part III begins our analysis of the content-based regulations of television violence by observing that much will depend on whether violent television programs constitute high- or low-value speech. We are inclined to think that television violence is high-value (albeit not necessarily high-quality) [\*1492] speech, entitled to the full protection of the rules the Supreme Court has crafted to govern content-based speech restrictions.

Part IV explores those rules. We quickly conclude, along with most others who have examined the issue, that Congress may not regulate television

violence as a "clear and present danger" under *Brandenburg v. Ohio*. n18 We explain, however, that, properly understood, the *Brandenburg* test simply provides the wrong analytical framework. In our view, most regulations of television violence should be scrutinized under a form of strict scrutiny the Court has developed to govern content-based regulations of high-value speech. Part IV sets forth the elements of "exacting scrutiny."

-Footnotes-

n18. 395 U.S. 444 (1969).

-End Footnotes-

Part V looks with exacting scrutiny at the principal proposals for content-based regulation of television violence. We believe that, even under exacting scrutiny, content-based regulations of televised violence may be premised on the data indicating that exposure to televised violence causes antisocial aggression. The problem that we find is not that the data fail to show a causal link between exposure to televised and antisocial aggression, but rather that the existing social science data do not supply a basis upon which one may determine with adequate certainty which violent programs cause harmful behavior. Because of this, legislators face an insurmountable problem in finding a generic definition of violence that is coherent and not overbroad. We fear that this may not be possible under a standard of exacting scrutiny. We conclude, therefore, that the proposals covering banning, zoning, and balancing cannot meet exacting scrutiny under the First Amendment. We think that most labelling proposals, although content-based, would be found lawful if designed to facilitate parenting. And, finally, we believe that because "V-Chip" and other user-blocking proposals easily can be written to be content-neutral, they will survive any constitutional challenge.

I. Is Broadcast Television Really Unique?

Legislators' and social scientists' concerns about the effects of media portrayals of violence on society predate the rise of television. Public attention focused on violence in films in the 1920s and shifted toward violent comic books in the 1940s. Ultimately, both the movie and comic book industries forestalled regulation by the federal government by adopting forms of self-censorship - the familiar ratings system of the Motion Pictures Association of America and the Comic Book Code, respectively. n19 If, however, Congress were suddenly to revisit its previous concern about violence in either movies or comics, [\*1493] or were it to focus on, say, violent videotapes, n20 any resulting regulations would be scrutinized under a single general body of First Amendment doctrine.

-Footnotes-

n19. For a succinct discussion, see *Prettyman & Hook*, supra note 6, at 320-21 & nn.2-9.

n20. See "Video Game Rating Act," H.R. 3785, 103d Cong., 2d Sess. (1994) (proposing a federal commission to produce a rating system for violent and sexually explicit video games).

- - - - -End Footnotes- - - - -

The broadcast media are different. In 1943, the Supreme Court first identified a "unique characteristic" of radio and television that justified a special level of First Amendment protection. n21 That unique characteristic was spectrum scarcity. The Court held that Congress could authorize the Federal Communications Commission to regulate broadcasting in the "public interest" because, "unlike other modes of expression, [broadcasting] inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." n22 FCC control over broadcast media meant a corresponding decrease in First Amendment protection.

- - - - -Footnotes- - - - -

n21. National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943).

n22. Id.

- - - - -End Footnotes- - - - -

The Court's "scarcity" rationale is not the only justification that has been offered for the different treatment accorded broadcast media under the First Amendment. Over the years, the Court has propounded two additional theses: Broadcasting is (1) uniquely accessible to children, and (2) uniquely pervasive or intrusive in the home. n23 A look at how these rationales distinguish this "unique" medium, broadcasting, from its extended family of other media and its not-so-distant cousin, cable, suggests that the Court should not consider broadcast television such a poor relation under the First Amendment.

- - - - -Footnotes- - - - -

n23. FCC v. Pacifica Found., 438 U.S. 726 (1978).

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A. Broadcast Media

In National Broadcasting Co. v. United States, n24 the Court justified governmental control of broadcast licenses based on the theory of spectrum scarcity. It was not until its unanimous decision in Red Lion Broadcasting, Inc. v. FCC, n25 however, that the Court spun out all of the First Amendment implications of the scarcity theory. The Court limited First Amendment protection for broadcasting with the following reasoning: Electromagnetic spectrum is a physically limited resource. Because more people wish to broadcast than there is broadcast space available, the government must assume control of the spectrum, allocating rights or licenses for its use. Otherwise, competitors might broadcast at the same frequency, causing interference or, worse, drowning each other out. Because the government owns the airwaves - in trust for the public - individual licensees similarly be [\*1494] come trustees. The government may, accordingly, require its licensees to broadcast in the public interest. n26

-Footnotes-

n24. 319 U.S. 190 (1943).

n25. 395 U.S. 367 (1969).

n26. Id. at 386-90.

-End Footnotes-

The Court explained, because "it is the right of viewers and listeners, not the right of the broadcasters, which is paramount," Congress may regulate broadcasters' speech under more lenient standards than would apply to regulations of speech of the other media. n27

-Footnotes-

n27. Id. at 390.

-End Footnotes-

Courts and commentators have argued for years that scarcity of the broadcast spectrum is neither an accurate technological description of the spectrum today nor a "unique characteristic" that should make any difference under the Constitution. n28 Although the radio spectrum may have appeared limited when the Court decided Red Lion, n29 today the nation enjoys a proliferation of broadcast stations. While in most cities, only one or two major newspapers exist, there will be many broadcasters and likely additional broadcast stations available for license. Should the country ever decide that it would like to increase the number of broadcast channels, it merely needs to devote more resources toward developing additional use of the electromagnetic spectrum. Technological scarcity today fails to justify different First Amendment treatment between broadcast and print. n30

-Footnotes-

n28. See, e.g., Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 508-09 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987); Lee C. Bollinger, Images of a Free Press 89-90 (1991); Donald E. Lively, Modern Media and The First Amendment: Rediscovering Freedom of the Press, 67 Wash. L. Rev. 599, 601-04 (1992); Matthew L. Spitzer, The Constitutionality of Licensing Broadcasters, 64 N.Y.U. L. Rev. 990, 1013-16 (1989) (refuting four different scarcity arguments: static technological scarcity, dynamic technological scarcity, excess demand scarcity, and entry scarcity).

n29. Plaintiffs in Red Lion argued otherwise; they contended that technological advances had produced a more efficient radio spectrum than existed in 1934. Red Lion, 395 U.S. at 396. The FCC provided statistics which showed that several UHF channels were available at the time. Id. at 398.

n30. Former FCC chairman Mark Fowler claims that advertising dollars restrict broadcast opportunities more than the number of channels. Mark S. Fowler & Daniel L. Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207 (1982).

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In Red Lion, the Supreme Court not only mentioned technological scarcity, but suggested that there was a demand for the spectrum that could not be satisfied. n31 Economists respond that all resources are limited and scarce in the sense that people would like to use more than exist. Other commentators concede the Court's point, but argue that because the government gives away a valuable commodity - the rights to use certain airwaves free of charge - the demand will always exceed the supply. The same would be true in other cases of economic generosity. Were the government to give paper away for free, the demand, especially among would-be newspaper publishers, would [\*1495] exceed the supply. n32 Again, economic scarcity does not justify the Court's bifurcated First Amendment analysis.

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n31. Red Lion, 395 U.S. at 388.

n32. Spitzer, supra note 28, at 1016.

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Finally, economists contend that just because something is technologically or economically scarce does not usually justify government regulation. n33 The government could easily avoid the chaos and discordance that would arise were broadcast frequencies equally and simultaneously available to everyone by treating broadcasting rights as private property. After an initial allocation, ownership and use would be governed by the free market. n34

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n33. Some commentators argue that technological scarcity does explain why government licensing of broadcasting is constitutional, but does not explain the Court's disparate treatment. See, e.g., David Shelledy, Note, Access to the Press: A Teleological Analysis of a Constitutional Double Standard, 50 Geo. Wash. L. Rev. 430 (1982).

n34. R.H. Coase, The Federal Communications Commission, 2 J.L. & Econ. 1 (1959) (providing an excellent account of how broadcasting could be governed in the free market).

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The Supreme Court has faced critiques of its scarcity rationale with ambiguous responses. In 1984, in FCC v. League of Women Voters, n35 the Court acknowledged the mounting criticism of "the prevailing rationale for broadcast regulation based on spectrum scarcity," but stated: "We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." n36 The following year the FCC provided a faint signal n37 and then, two years later, directly responded to the Supreme Court's veiled inquiry. The FCC held the Fairness Doctrine unconstitutional stating, "the scarcity rationale ... no longer justifies a different standard of first amendment review for the

electronic press." n38 Nevertheless, the following year, the Court upheld the FCC's minority ownership licensing preferences, invoking the spectrum scarcity rationale without qualification. n39 And in 1994, in Turner Broadcasting System, Inc. v. FCC ("TBS"), n40 the Court reiterated that a lesser standard of scrutiny for regulations of broadcast media is alive, while hinting that it is potentially unwell. n41 [\*1496] Thus, although the scarcity rationale is now widely discredited by courts and commentators, the Supreme Court continues to use it to justify broadcast's reduced First Amendment protection.

-Footnotes-

n35. 468 U.S. 364 (1984).

n36. Id. at 376-77 n.11.

n37. The FCC initiated hearings on the Fairness Doctrine, which produced a report concluding that the public had access to diverse viewpoints and thus undercut the scarcity rationale. In the Matter of Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145 (1985).

n38. In re Complaint of Syracuse Peace Council Against Television Station WTVH, 2 F.C.C.R. 5043, 5053 (1987).

n39. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 566-67 (1990).

n40. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994) ("TBS").

n41. Id. at 2456 (observing that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation") (emphasis added); id. (stating that "we have declined to question its continuing validity as support for our broadcast jurisprudence ... and see no reason to do so here") (citing FCC v. League of Women Voters, 468 U.S. 364 (1984)).

-End Footnotes-

In 1978, in FCC v. Pacifica Foundation, n42 the Court offered two additional rationales for granting limited First Amendment protection to broadcasting. Although this case involved indecency as opposed to violence and radio as opposed to television, the reasoning was offered to support lesser First Amendment protection to broadcast generally. First, the Court found that "broadcasting is uniquely accessible to children, even those too young to read." n43 This observation may distinguish print from broadcast, but it fails to draw a line between broadcast and motion pictures. In any event, while the "accessible to children" rationale may help justify regulations that protect children from, say, exposure to obscene materials in the media, in most cases it does so without attacking the media's core First Amendment protection.

-Footnotes-

n42. 438 U.S. 726 (1978).

n43. Id. at 749.

-End Footnotes-

The second rationale offered in *Pacifica* to justify lesser First Amendment protection was the intrusiveness or pervasiveness of broadcasting. The Court stated, "the broadcast media have established a uniquely pervasive presence in the lives of all Americans.... [The] material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home ...." n44 This controversial characterization might prompt Joe Couch Potato to wonder whether the Justices ever noticed the "off" button on their remote controls as an efficient mechanism with which to fend off intrusive and pervasive television. The pervasiveness rationale certainly does not distinguish broadcast from print. We find the onslaught of catalogues and junk mail, and now junk telephone mail, more intrusive than a controllable television set or radio. Again, while intrusiveness along with the accessibility of broadcast to children may describe government interests in regulation of televised violence, the rationales do not justify widely disparate legal treatment between broadcast media and other types of media.

-Footnotes-

n44. Id. at 748.

-End Footnotes-

B. Cable

After several years of delicately hedging the question of cable's precise constitutional status, n45 the Supreme Court recently held in [\*1497] *TBS* that cable television gets the same First Amendment protection as do all the nonbroadcast media. n46 *Cable's* status sheds new light on the Supreme Court's rationales. There is no spectrum scarcity in cable television. Thus, cable offers spectrum-based communications media an abundance of alternatives and essentially renders the physical scarcity argument superfluous. And surely cable is as accessible to children as broadcast television and most likely as pervasive or intrusive. Even considering these two rationales together, cable television will doubtless have as great an impact on a child as broadcast television. The Court's *TBS* decision drives home the irrationality of granting broadcast television less First Amendment protection than all other media.

-Footnotes-

n45. See *Leathers v. Medlock*, 499 U.S. 439, 444 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) (noting that the Court had yet to "determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing [First Amendment] standard or whether those characteristics require a new analysis").

n46. *TBS*, 114 S. Ct. at 2455-56; *id.* at 2476 (O'Connor, J., concurring in part and dissenting in part) (stating that "cable programmers and operators stand in the same position under the First Amendment as do the more

traditional media").

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C. Our Thinking

We believe that the justifications distinguishing broadcast from other media such as print, and especially distinguishing broadcast from cable, will not hold. Maintaining the scarcity rationale or the Pacifica reasoning, or even formulating new justifications will prove difficult in future cases; we therefore venture to guess that the Court will eventually feel forced to bring broadcast television and radio into the First Amendment fold, and allow broadcasting to enjoy the full protection it deserves. In fact, Zechariah Chafee's historical analysis of the Supreme Court's responses to different media provides insight and counsels patience.

Newspapers, books, pamphlets, and large meetings were for many centuries the only means of public discussion, so that the need for their protection has long been generally realized. On the other hand, when additional methods for spreading facts and ideas were introduced or greatly improved by modern inventions, writers and judges had not got into the habit of being solicitous about guarding their freedom. And so we have tolerated censorship of the mails, the importation of foreign books, the stage, the motion picture, and the radio.  
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n47. Zechariah Chafee Jr., Free Speech in the United States 381 (1954).

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For our purposes, regulation of televised violence will likely include both broadcast and cable. Even assuming the most extreme forms of regulatory control, the power to regulate broadcast media can hardly be seen as a solution for those intent on curbing the ill-effects of televised violence. Given the near universal agreement that cable television features more, and more graphic, violence than does [\*1498] broadcast television, n48 it is fanciful at best to think that regulation of broadcast television with no corresponding regulation of cable television will make any serious difference in addressing the perceived problem of linkage between televised violence and antisocial behavior. And most people in American society would find absurd the idea that a single law purporting to regulate televised violence could constitutionally be applied to broadcast television, but not to cable.

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n48. See, e.g., David Barry, Screen Violence: It's Killing Us, Harv. Mag., Nov.-Dec. 1993, at 38, 41; Bill Carter, Uproar on TV Violence Frustrates the Networks, N.Y. Times, July 5, 1993, at A41.

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In short, we believe that, at the very least, the Court must treat broadcast and cable alike. Because we find the spectrum scarcity rationale to be a useless line of analysis and because we cannot comprehend any meaningful distinctions

between portrayals of violence on broadcast and cable television, we think that the Court's judgment in TBS must lead to the conclusion that all television operators stand in the same position under the First Amendment as do the more traditional media.

This Article proceeds then on the twin assumptions that the various regulations we consider would be designed to apply to both broadcast and cable television, n49 and that their constitutionality will be measured by the maze of First Amendment doctrine generally. Having surmised that the Court will eventually bring broadcast television and radio within the protective fold of the First Amendment, we should make it clear that we are not as confident as some that this is inevitable, much less imminent. n50 We have no divine wisdom on this point. n51

-Footnotes-

n49. Although many of the recent congressional hearings focused on the broadcast networks, see, e.g., John J. O'Connor, Labeling Prime-Time Violence is Still a Band-Aid Solution, N.Y. Times, July 11, 1993, at II.1, the major bills introduced to combat television violence apply to both broadcast and cable television. See supra notes 9-12; see also Ernest F. Hollings, TV Violence: Survival Vs. Censorship - Save the Children, N.Y. Times, Nov. 23, 1993, at A21 (describing the Senate bill, sponsored by the author, to "ban the broadcast or cable transmission of violent programming during hours when children make up a substantial share of the audience").

n50. See, e.g., Note, The Message in the Medium: The First Amendment on the Information Superhighway, 107 Harv. L. Rev. 1062, 1074 (1994) [hereinafter Information Superhighway].

n51. We also recognize that at least one important scholar argues that, notwithstanding the weakness of the spectrum scarcity rationale, different levels of constitutional protection for different media can be justified as the best means to serve the competing First Amendment values of press autonomy and public access to information. See generally Bollinger, supra note 28.

-End Footnotes-

We also note that in rejecting any per se rule that would afford different levels of protection to the electronic media relative to the print media, or to broadcast television relative to cable, we do not suggest that the validity of a particular regulation of violence must be the same for all media. For example, a conclusion that mandated disclosure of violent television programming is constitutional does not necessarily mean that a similar regulation could constitutionally be applied either to comic books or to the movies. After all, the same [\*1499] themes, words, stories, or images do not constitute identical speech when transmitted by different media any more than a printed musical score is "the same thing" as its orchestral performance. n52 Televised violence and print violence focused on the same theme may have a very different communicative impact. If so, the government might be permitted to regulate one and not the other, a difference in treatment that hinges upon the different features of the instant expression rather than upon any supposed categorical differences between the two media. n53

-Footnotes-

n52. Cf. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) ("Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems.").

n53. This is a central theme of both Matthew L. Spitzer, *Seven Dirty Words and Six Other Stories: Controlling the Content of Print and Broadcasting Media* (1986), and *Lively*, supra note 28. Cf. *TBS*, 114 S. Ct. at 2457 ("This is not to say that the unique physical characteristics of cable transmission should be ignored when determining the constitutionality of regulations affecting cable speech. They should not.... But whatever 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.").

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II. Content-Based and Content-Neutral Regulations

It is a black-letter rule of First Amendment jurisprudence that courts will apply more rigorous scrutiny to government regulations that abridge expression on the basis of its "content" or "subject matter" than to restrictions that apply equally to a range of speech without regard for its content. n54 The distinction rests in large part upon the bedrock supposition that the First Amendment guards against governmental attempts to preempt or distort public debate by favoring or disfavoring topics, speakers, or viewpoints. n55 This relatively straightforward principle is, however, anything but straightforward in operation. As the Court has recently remarked, "deciding whether a particular regulation is content-based or content-neutral is not always a simple task." n56 In this Part of the Article, we undertake that task with regard to the various proposals to regulate televised violence. [\*1500]

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n54. See, e.g., *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2047 (1994) (O'Connor, J., concurring) ("The normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content-based or content-neutral, and then, based on the answer to that question, to apply the proper level of scrutiny."); Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech*, 3.02[1], at 3-11 (1994) ("The distinction between content-based and content-neutral regulations of speech is one of the central tenets of contemporary First Amendment jurisprudence.").

n55. See, e.g., *TBS*, 114 S. Ct. at 2459; *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (stating that First Amendment guarantees serve to "foreclose public authority from assuming a guardianship of the public mind"). Accordingly, the fact that content-neutral regulations might actually burden more speech than content-based ones, see, e.g., Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 *Stan. L. Rev.* 113, 128 (1981), is not entirely germane.

n56. *TBS*, 114 S. Ct. at 2459.

-End Footnotes-

A. Banning/Zoning

Any regulation that burdens television programming because it contains portrayals of violence, and does not equally burden nonviolent programming, is "content-based": it regulates expression on the basis of its subject matter. This is so regardless of how the law might define "violence," n57 or whether the regulation affects only some subset of violent programming, excepting, say, news programs and historical dramas. Thus, a regulation that bans television shows that depict violence n58 is content-based. Similarly, a regulation that "zones" such violent shows into (or out of) particular time slots or channels is also content-based.

-Footnotes-

n57. For example: "The threat or use of force that results, or is intended to result, in the injury or forcible restraint or intimidation of persons, or the destruction or forcible seizure of property." Violence & the Media, supra note 7, at 235.

n58. Throughout this Part, mention of "violent television programs," or "televised violence," or the like, refers to whatever subset of programs could plausibly be deemed "violent" under a particular regulatory scheme. The difficulty of delineating such a subset consistent with the First Amendment is discussed infra sections III.B.2 and V.A.2.

-End Footnotes-

Some commentators have disputed this conclusion, offering two related arguments for why these seemingly paradigmatic examples of content-based regulation are content-neutral for purposes of the First Amendment. Under one view, a law that prohibits the airing of violent programs at certain times or on certain channels would not be content-based at all. Instead, this view goes, such a regulation would be a content-neutral time, place, or manner restriction and accordingly subject to intermediate scrutiny. n59 Professor Cass Sunstein, for example, has argued that "the notion that the Constitution forbids government from placing time, place and manner restrictions on violence in children's programming seems to me an adventurous argument that goes well beyond the First Amendment." n60 At this point, we are not prepared to confront the bottom-line question whether the Constitution does or does not forbid such restrictions. The more important issue Professor Sunstein raises is whether "restrictions on violence in children's programming" - "[a] regulation to protect children that is directed at Saturday morning programming, for instance" n61 - should be judged under the more lenient standards that apply to time, [\*1501] place, and manner restrictions rather than under content-based standards.

-Footnotes-

n59. Time, place, and manner regulations must be " "narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information." " 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)). The "narrowly tailored" criterion is considerably less strict in the context of time, place, and manner regulations than it is when applied to content-based regulations. See Ward, 491 U.S. at 798-99 & n.6.

n60. Richard C. Reuben, Pulling the Plug on TV Violence, Can Government Regulate Broadcast Content? Concern About Real Violence Revives the Issue, Cal. Law, Jan. 1994, at 39, 41.

n61. Id. at 40.

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Professor Sunstein's argument seems sensible at first glance: instead of broadly prohibiting all representations of violence in the media, Congress might choose to prohibit (or otherwise limit) violent programs at a given time (say, Saturday morning, or prime time weekdays), at a given place (on television), in a given manner (violently). n62 In this view, a ban on violent programming between, say, 7 a.m. and 8 p.m. on television, is analytically indistinguishable from a prohibition on noisy picketing between 9 a.m. and 3 p.m. in front of a school. n63 Arguably, both are content-neutral because each applies to a category of expression regardless of what the speech is "about."

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n62. See Julia W. Schlegel, Note, The Television Violence Act of 1990: A New Program for Government Censorship?, 46 Fed. Comm. L.J. 187, 206 (1993) (quoting Dean Gene Nichol: The TV Violence Act [which gave broadcasters a three-year antitrust exemption to agree on violence standards] "is aimed not at the suppression of free expression, but at the control of messages thought to be harmful because of the manner in which they are delivered"); see also infra note 68.

n63. See Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding ordinance prohibiting noisemaking adjacent to a school while classes are in session).

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The error of this reasoning would appear to lie in the assumption that "violence" describes a manner of presentation rather than its content. It is well established that "[a] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech" n64 And, to most observers, the content-ness of violence would probably need no extended argument. n65 At least intuitively, violence cannot be divorced from content: It seems truly meaningless, for example, to assert that producers of a war movie, or of a dramatic series on mafia crime lords, or of a James Bond-like sitcom could or should have presented the same content or "subject matter" in a nonviolent manner. Violence is part of the story.

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n64. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980); see also Burson v. Freeman, 112 S. Ct. 1846, 1850 (1992); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984); Erznoznik v.

City of Jacksonville, 422 U.S. 205, 209 (1975); Police Dep't v. Mosley, 408 U.S. 92, 99 (1972).

n65. Notably, in their lengthy consideration and rejection of the time, place, and manner argument, Krattenmaker and Powe never question that violence is content. See, e.g., Krattenmaker & Powe, supra note 14, at 1270 ("Thus, although advocates of zoning televised violence undoubtedly will assert that zoning is simply a time limitation not a prohibition and that other times are available to present violent programming, the argument runs afoul of the basic principle of the time, place, and manner cases because it is entirely related to content."); see generally id. at 1267-73.

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Yet, these illustrations might prove too much. Even sound volume, the paradigm of "manner" in time, place, and manner jurisprudence, n66 can sometimes look like content. The notion of a quiet performance of the 1812 Overture, for instance, is no less oxymoronic [\*1502] than that of a nonviolent production of Lethal Weapon. We need a more satisfactory way of distinguishing manner from content than mere intuition provides.

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n66. See, e.g., R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2544 (1992).

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The fact is that the analytically distinct concepts "content" and "manner" correspond to a considerably less distinct reality. Like form and substance, the two are intertwined characteristics of a whole. n67 Just as an aspect of expression that usually looks more like manner (e.g., sound level) can at times appear to be content, so too a feature that generally serves a content function can assume the appearance of manner. The distinction between content and manner, then, would appear to be simply a way of differentiating the predominant and peripheral elements of a communication. If (and only if) an aspect of the communication can be regulated while only minimally impacting upon the meaning of the expression (a judgment call, to be sure), call it "manner" rather than "content." For this reason, analysts who insist that violence "just is" content or "just is" manner may be equally wrong: n68 depending upon context and communicative purpose, violence can assume the guise of either. If so, the distinction between content and manner evokes the familiar distinction between "thematic" and "gratuitous" violence. If it can be assumed that gratuitous violence is unnecessary to the message, then it might be argued that a law limited to restricting only gratuitous violence is a "manner" regulation.

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n67. See Cohen v. California, 403 U.S. 15, 26 (1971) (overturning a conviction for the wearing of a jacket bearing the language "Fuck the Draft" under a statute prohibiting "offensive conduct" and rejecting "the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process").

n68. Compare Michael D. Rips, Children's TV Bill Doesn't Violate Constitution, N.Y. Times, Dec. 2, 1993, at A26 (letter to the editor) (arguing

that prohibition on violence during children's viewing hours is constitutional time, place, and manner restriction because, "since violence itself carries no inherent message, the regulation of violence is not a restriction of speech based on its content") with Floyd Abrams, TV Violence and "Content-Neutral' Legislation, N.Y. Times, Dec. 9, 1993, at A30 (letter to the editor) ("But such a ban, imposed because of Congressional disapproval of programming containing violence, is precisely what the First Amendment does not permit. It cannot be "content-neutral' for Congress to prohibit certain programming because of its content."). Abrams's response, in particular, is strikingly tautological.

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At first blush, an approach focused on "gratuitous" violence might seem to be an analytically satisfactory way to distinguish content and manner in a given expressive act. But the fact that gratuitous violence exists in televised programming does not necessarily mean that there exists any reasonably objective way of identifying it. We cannot imagine how a regulator might fix rules designed to ferret out gratuitous violence without running the risk of wholesale censorship of television programming. The grave difficulty in drawing the appropri- [\*1503] ate lines n69 would turn any such inquiry into a jurisprudential quagmire. And perhaps for that reason, the Court has not adopted it. Instead of focusing its inquiry upon the speech at issue, the Court has looked to the regulation and its purpose. Thus, when the government has alleged that a given speech restriction is a time, place, and manner regulation, the Court has insisted that it be "justified without reference to the content of the regulated speech." n70

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n69. Consider the contemporary debate over colorization: colorizers argue that black-and-white is merely the manner in which a film was presented; opponents believe that a choice about color (or its lack) is a more fundamental aspect of the whole.

n70. 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)) (emphasis supplied in Ward).

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On its face, this restatement is of little value, for it appears merely to direct that courts should defer to legislative determinations regarding what is "content" and what is "manner." Accordingly, to make sense of this standard, "content" must be viewed as something akin to "communicative impact." n71 Thus, as the Court has noted, law that "suppresses expression out of concern for its likely communicative impact ... cannot be "justified without reference to the content of the regulated speech.' " n72 That is, a law directed at the communicative impact of expression is ipso facto "content-based" for purposes of First Amendment doctrine - notwithstanding that an analysis of some or all of the expression affected can make the regulated element look like manner. n73 Without undertaking at this point a thorough examination of the ways that television violence is supposed to affect its viewers, it is nonetheless clear that would-be regulators are concerned about the ideas, attitudes, and values that television violence communicates to its audience. n74 [\*1504]

-Footnotes-

n71. See generally Laurence H. Tribe, American Constitutional Law 12-2, at 789 (2d ed. 1988) (explaining that government abridgment of speech based on "communicative impact" is singled out either "because of the specific message or viewpoint such actions express" or "because of the effects produced by awareness of the information or ideas such actions impart").

n72. United States v. Eichman, 496 U.S. 310, 317-18 (1990) (quoting Boos v. Barry, 485 U.S. 312, 320 (1988)) (invalidating federal statute prohibiting defacing or burning flag of the United States).

n73. This point is well illustrated by Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), which involved the application of a statutory ban on public nudity to nude dancing establishments. All four opinions in that case accepted the major premise that content-based scrutiny would apply if the statute was motivated by hostility to the communicative impact of public nudity. They disagreed only over the minor premise. See id. at 571-72 (plurality opinion) (determining that statute is aimed at conduct, not communicative impact, and upholding it under the intermediate scrutiny of United States v. O'Brien, 391 U.S. 367 (1968)); id. at 579-80 (Scalia, J., concurring) (same, but rejecting O'Brien and upholding statute under rational basis review); id. at 586 (Souter, J., concurring) (arguing that statute is aimed to curb such "secondary effects" as "prostitution and sexual assault," and upholding statute under intermediate scrutiny); id. at 595-96 (White, J., dissenting) (determining that statute is aimed at communicative impact of public nudity and invalidating it under content-based scrutiny).

n74. For example, in the words of Senator Paul Simon, one of the leading advocates of voluntary and legislative curbs upon television violence, "We're talking about deglamorizing violence, about portraying it realistically. The positive message needs to be delivered that violence brings no pleasure." Joan Connell, Congress Putting the Heat on Television Violence; But Critics Call Action a "Big Chill," Times-Picayune (New Orleans), Aug. 7, 1993, at A8, quoted in Kim, supra note 3, at 1391.

-End Footnotes-

This conclusion also forecloses resort to the second and closely related argument for why banning or zoning televised violence is content-neutral. This second approach relies upon a variant of the ordinary time, place, and manner doctrine - the "secondary effects" test of City of Renton v. Playtime Theatres, Inc. n75 In Renton the Court applied intermediate scrutiny to a law that zoned adult theatres. The Court first acknowledged that the statutory classification discriminated against theatres on the basis of the content of the films shown. It determined, however, that the ordinance was not "content-based" for purposes of First Amendment scrutiny because it was "aimed not at the content of the films shown ... but rather at the secondary effects of such theaters on the surrounding community." n76

-Footnotes-

n75. 475 U.S. 41 (1986).

n76. Id. at 47. The Court never identified the worrisome secondary effects with any great precision, but rather adverted generally to such interests as "preventing crime, [and] protecting the city's retail trade, ... property values, ... and the quality of urban life." Id. at 48 (internal quotation omitted); see also *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (plurality opinion).

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Reliance upon Renton would eliminate the need to affix the counter-intuitive label "manner" to the violence element in televised communication. The argument here is that such a regulation is not "content-based" for purposes of the First Amendment precisely because the legislation is not motivated out of hostility to the communicative impact of television violence. In fact, several commentators have urged that Renton would permit time zoning of television violence because the secondary effects test "seems ideally tailored to the media violence context, where concern focuses on the violent after-effects of viewing." n77

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n77. *Prettyman & Hook*, supra note 6, at 371 n.228; see also *Schlegel*, supra note 62, at 206-07.

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This argument is dubious. Whenever it acts to restrict freedom of expression, the government acts, in an ultimate sense, out of concern with the effect of that communication. n78 As the Court remarked in *Boos v. Barry*, "listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*." n79 One may surmise that the Court's decision in *Boos* is intended to limit the reach of *Renton*. According to the Court, if the ordinance in *Renton* had been "justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate." n80 Thus, *Renton* applies only when the alleged harm occurs outside of the causal chain linking the communicative meaning and effect of particular expression with its actual or intended audience. Because whatever harms television violence might cause are allegedly a product of its communicative impact, neither ordinary time, place, and manner analysis nor the secondary-effects doctrine would appear to provide an avenue to remove zoning or banning of television violence from content-based scrutiny. n81

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n78. See *Smolla*, supra note 54, 3.02[4][a].

n79. 485 U.S. 312, 321 (1988); see also *id.* ("The emotive impact of speech on its audience is not a 'secondary effect.' "); *id.* at 334 (Brennan, J., concurring); *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2403 (1992).

n80. *Boos*, 485 U.S. at 321.

n81. The case might be otherwise if the harm identified was, say, truancy rather than violence and if the causal chain established that violent

television was so hypnotic that children were skipping school in droves to stay at home to watch. In that event, a zoning rule that proscribed television violence during school hours might properly be analyzed under Renton. Of course, whether it would pass scrutiny is a separate question.

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B. Balancing

In simple form, a balancing rule would require programmers who air violent programs to compensate by airing nonviolent programs. Slightly more elaborately, were Congress to focus on the way that programs portray violence, n82 it could require that disfavored presentations of violence be matched with favored presentations. For example, a program that glorifies violence (The Terminator, say) need be matched with one that disparages it (Boyz "N the Hood, perhaps). Regardless of degree of subtlety, the regulation would be content-based in two ways. First, once invoked, it would require programmers to air programs of a prescribed content. Second, whether it is invoked is likewise determined by a program's content. n83 This is self-evident. The somewhat more interesting question is whether a balancing rule abridges speech within the meaning of the First Amendment. After all, it could be argued that by requiring programmers to air a wider range of programming, such a regulation would actually further one of the purposes of the First Amendment, the exchange of diverse views.

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n82. See infra section V.A.2.

n83. See Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 12-14 (1986). For contrast, imagine a balancing rule, provoked perhaps by concern that citizens watch too much television, that would require programmers to balance every two-hour program with four half-hour shows.

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The Supreme Court has squarely rejected such an argument in the past. In Miami Herald Publishing Co. v. Tornillo, n84 the Court struck down a state "right of reply" statute which obligated newspapers that attack a political candidate to publish such candidate's printed reply free of charge. n85 The Court held that the statute [\*1506] abridged freedom of the press for two independent reasons. First, "compelling editors or publishers to publish that which reason tells them should not be published" is inherently anathema to the First Amendment. n86 Second, the Court rejected the idea that forced reply would expand information available to the public. It identified two concerns. The forced speech would displace other material that the newspaper would have preferred to publish. n87 Also, to avoid application of the statute, newspapers might choose to steer clear of controversy. "Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate.'" n88

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n84. 418 U.S. 241 (1974).

n85. The Court had previously examined a similar rule applied to broadcasters. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), involved

a similar right of reply regulation as well as the FCC's Fairness Doctrine, which obligated broadcasters to provide balanced coverage of controversial public issues. Relying upon the scarcity of the broadcast spectrum, the Court upheld the rules on the grounds that they advanced the "paramount" First Amendment rights of viewers and listeners. Id. at 390.

While the fairness doctrine was still in force, one viewer petitioned the FCC to apply the doctrine to the issue of television violence. See *In re George D. Corey*, 37 F.C.C.2d 641 (1972). Strangely, although the petitioner specifically invoked the fairness doctrine, under that caption he requested only that the FCC require broadcasters to attach health advisories to violent children's programming. Id. at 641. He did not ask that the FCC require broadcasters to devote air time to programming that would present views discouraging violence. The FCC rejected his petition principally on the grounds that "the real thrust of [the] complaint would appear to be not fairness ... but the elimination of violent TV children's programming because of its effect on children," and that the issue was therefore more appropriately addressed by Congress. Id. at 644.

n86. *Miami Herald*, 418 U.S. at 256 (internal quotations omitted).

n87. Id.

n88. Id. at 257 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964)).

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Both reasons apply similarly to establish that a balancing rule applied to television violence would require content-based scrutiny. First, it would force programmers to air programs that, *ex hypothesi*, they otherwise would not. It thus violates the notion that the First Amendment "includes both the right to speak freely and the right to refrain from speaking at all." n89 Second, the statute would effectively silence speech either by inducing programmers to shelve violent programs to avoid the imposition of the rule, or by displacing the programs the programmer would have aired in lieu of whatever (types of) programs invocation of the rule would direct. n90 Consequently, the holding as well as the reasoning of *Miami Herald* seem to establish that a balancing rule applied to violent programming must draw content-based scrutiny.

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n89. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (invalidating New Hampshire statute making it a misdemeanor for a motorist to obscure the state motto "Live Free or Die" on her license plate); see also *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943) (overturning compulsory flag-salute statute).

n90. Of course, in contrast to the statute at issue in *Miami Herald*, a violence-balancing law might well be enacted precisely in order to discourage violent programming. But that is all the more reason to subject it to heightened scrutiny. See *Bantam Books v. Sullivan*, 372 U.S. 58 (1963).

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[\*1507]

C. Labelling and Disclosure Rules

Like all of the regulations discussed, a disclosure requirement could take several different forms. One technique is presently in use. Since the fall of 1993, the four major networks, soon followed by fifteen cable channels, n91 have aired parental violence advisories before programs that the particular broadcaster deems to warrant it. The terse warning reads: "Due to some violent content, parental discretion advised." n92 A second method would mimic the familiar movie rating system of the Motion Pictures Association of America. Other methods are readily conceivable. However, were the government to mandate that broadcasters and cable programmers identify particular programs on the basis of the violence that they contain, that would seem to constitute a content-based regulation.

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n91. See Elizabeth Kolbert, Entertainment Values Vs. Social Concerns in TV-Violence Debate, N.Y. Times, Aug. 3, 1993, at C13.

n92. See Edmund L. Andrews, Mild Slap at TV Violence, N.Y. Times, July 1, 1993, at A1. Although the networks may have felt pressured to adopt the advisory system by the threat of congressional action, they were not obligated to do so, and they continue to broadcast each advisory at their individual discretion. We believe that the present advisory system is indeed voluntary for constitutional purposes and raises no problems under the First Amendment.

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As in the case of compulsory balancing, the real question here is whether such compulsory labelling burdens speech within the meaning of First Amendment jurisprudence. Both rationales advanced in Miami Herald would suggest an affirmative answer. n93 However, Krattenmaker and Powe, two staunch opponents of other forms of television violence regulation, concluded that, "constitutionally, requiring notice seems unobjectionable.... Little reason exists to believe that one should be free of informational requirements that are ideological neutral just because he distributes a product entitled to protection under the first amendment." n94 In developing this claim, Krattenmaker and Powe appear to respond only to the argument that forced speech is inherently offensive to the First Amendment. In essence, they emphasize the differences between requiring individuals to express an allegiance or affirm an ideological position, and obligating "sellers" to disclose "characteristics objectively ... ascertainable and demonstrably relevant to informed choice by consumers." n95

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n93. True, a disclosure rule might seem less of a burden than a balancing rule, but the Court has repeatedly held that content-based burdens upon speech are subject to the same level of scrutiny as would apply to content-based prohibitions of the same speech. See, e.g., Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 116 (1991); Healy v. James, 408 U.S. 169, 183 (1972); Bates v. City of Little Rock, 361 U.S. 516, 523 (1960). As we will see, the degree of burden is relevant to the question whether a given content-based regulation is "narrowly tailored" to achieve its purpose. See

infra subsection IV.B.2.(b). But that is a separate inquiry.

n94. Krattenmaker & Powe, supra note 14, at 1276-77.

n95. Id. at 1277.

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[\*1508]

The Krattenmaker and Powe position is appealing, but short-sighted. Assuming arguendo that the imposition of a violence-disclosure requirement against the media is not inherently obnoxious to the First Amendment, Krattenmaker and Powe fail to address the consequentialist concern that this mandated disclosure might offend the First Amendment by resulting in less speech. For example, there is a good possibility that a labelling or advisory rule would in fact directly induce programmers to alter their violent fare. The danger is not simply that broadcasters will cancel their more violent programs. The risk is also that they will edit their less violent programs to avoid the disclosure obligation. n96 Much will depend of course on the precise content of the required disclosure. We need not dwell on this issue, however, for the Supreme Court's opinion in Riley v. National Federation of the Blind n97 offers a third and possibly dispositive reason (one not implicated in the balancing cases) for concluding that the requirement of a violence-advisory requires content-based scrutiny. Riley involved a state law that, inter alia, required professional fundraisers to disclose to potential donors the percentage of charitable contributions collected over the past twelve months that the fundraiser turned over to charity. The Court reasoned that "mandating speech that a speaker would not otherwise make necessarily alters the content of the speech," and "therefore considered the Act as a content-based regulation of speech." n98

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n96. Examples of movie producers editing films to escape an "X" or even an "R" rating are legion. See, e.g., Richard P. Salgado, Regulating a Video Revolution, 7 Yale L. & Pol'y Rev. 516, 523-25 & nn.52-61 (1989).

n97. 487 U.S. 781 (1988).

n98. Id. at 795.

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The Court's observation that mandated disclosure alters the content of speech can be read trivially: If you say X, and the government obligates you to add Y, the content of your speech has surely changed; where it had been X alone, it is now X+Y. We believe, however, that the Court was advancing a much more important insight: mandating disclosure that a speaker would not otherwise make necessarily alters the content of the speech to which the mandated disclosure would attach. The whole is different from the sum of its parts. Because mandated speech is transformative, not merely additive, the X in X+Y is no longer the same X. This elementary hermeneutic truth applies fully to a government regulation that would require programmers to label or otherwise identify programs on the basis of their violent character or content. Viewers' experience of a program will be shaped by the way it is characterized. By requiring programmers to foreground one aspect of a given program - its violence - the

government would affect the impact of the program upon its viewers. In a real sense, this changes the meaning of the speech. [\*1509]

Consider in this regard the effect of a title upon a viewer's or reader's experience of a work as a whole. Like a violence rating, a title serves essentially a labelling function. But titles do more than attract an audience; they subtly - but inevitably - color the way the audience will experience the work. It is for this reason that editors do not feel free to supply titles for Emily Dickinson's poems.

Against Riley and the balancing cases, one Supreme Court opinion appears to provide support for the conclusion that mandatory violence disclosures would not provoke content-based scrutiny. n99 In Meese v. Keene, n100 the Court upheld against First Amendment challenge a federal statute that imposes registration and disclosure requirements upon expressive materials designed to influence U.S. foreign policy and disseminated by agents of a foreign power, and that identifies such materials as "political propaganda." In an opinion by Justice Stevens, the Court held that "the Act places no burden on protected expression." n101 The Court emphasized two factors. First, the Court insisted that, as defined by the statute, the term "political propaganda" is not pejorative. n102 Second, it explained that the law does not actually abridge any speech, but rather advances the purposes of the First Amendment:

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n99. See Kim, supra note 3, at 1409-13 (presenting Riley and Keene as parallel lines of authority that would yield conflicting results).

n100. 481 U.S. 465 (1987).

n101. Id. at 480.

n102. Id. at 483-85.

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Disseminators of propaganda may go beyond the disclosures required by statute and add any further information they think germane to the public's viewing of the materials. By compelling some disclosure of information and permitting more, the Act's approach recognizes that the best remedy for misleading or inaccurate speech contained within the materials subject to the Act is fair, truthful, and accurate speech. n103

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n103. Id. at 481. Cf. Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 16 (1986) (plurality) ("That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster.").

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The dissenters disputed both claims. First, they argued as a matter of logic and common sense that requiring people to label their speech as political

propaganda will negatively affect the reception of that speech, regardless of how the statute defines the term. n104 Second, they insisted on the basis of precedent that if a disclosure requirement will burden or "chill" speech, then the government's allegation that speakers can mitigate the negative effect by adding more speech is constitutionally irrelevant. n105

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n104. 481 U.S. at 488-90 (Blackmun, J., dissenting).

n105. Id. at 490-93 (Blackmun, J., dissenting).

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It is not easy to square the holdings in Miami Herald and Riley with the judgment in Keene. One commentator has gone so far as to [\*1510] say that the "whole line of argument [in the Keene majority opinion] has a deeply fraudulent character." n106 Arguably, Keene turned simply on a close reading of the actual label that the statute requires to be placed on the materials for public dissemination. The labels do not contain the word "propaganda"; they are essentially limited to the name and address of the disseminator, and the fact of affiliation with a foreign power. n107 Read this way, Keene stands for a narrow proposition: Some forced disclosure is so value-neutral and connotatively empty that its de minimus effect on the content of speech does not suffice to warrant content-based scrutiny. In other words, the regulation, although content-based, is not an "abridgement" or a "burden." This seems specious, but we need not reach a conclusion on this for purposes of the present analysis. Taking Keene at its worst, we think the issue is whether a relatively barebones disclosure requirement is deemed an abridgement even absent a particularized showing of special inhibitory effect. In the face of such a showing, however, the propriety of content-based scrutiny is certain. n108

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n106. Smolla, supra note 54, 10.03[1], at 10-79.

n107. See Keene, 481 U.S. at 471 ("It should be noted that the term 'political propaganda' does not appear on the form."); id. at 479 n.14 ("The statutory term is a neutral one, and in any event, the Department of Justice makes no public announcement that the materials are 'political propaganda.'").

n108. See, e.g., Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 100-02 (1982); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 557 (1963); Talley v. California, 362 U.S. 60, 64 (1960); NAACP v. Alabama, 357 U.S. 449, 462 (1958).

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Insofar as television is concerned, it is surely the case that to isolate and foreground one aspect or theme of a program will influence and change the viewer's experience. For example, by causing viewers to anticipate violence, a violence advisory will undermine the dramatic effect of an isolated and unexpected violent scene. In general, that familiar visceral response to a movie, play, or book - "That wasn't as - - as I had expected!" - amply testifies to the fact that expectation shapes experience.

There are, in sum, several reasons to conclude that mandatory violence disclosure is a content-based regulation of speech: (1) it may reduce the amount of violent programming; (2) it forces programmers to affirm a judgment with which they might disagree; and (3) it will directly interfere with and reshape the way that viewers experience the labelled programming. Even one of these factors is enough to conclude that governmentally required labelling or violence disclosure n109 would provoke content-based First Amendment scrutiny.

-Footnotes-

n109. A different conclusion might follow if the state (somewhat purposelessly) required only that every programmer provide a brief synopsis or description - of its own devising - before every program.

-End Footnotes-

[\*1511]

D. Lock-out Technology

A very different inquiry is raised by technological approaches designed to facilitate parents' control over the television viewing habits of their children. There are at least three different types of mechanisms, varying widely in degree of technological sophistication. The simplest device, a lockbox, merely permits users to block out particular channels. A second type of system could block the display of particular channels at particular time slots. Just as a viewer can program a VCR to record a particular show, a program-blocking system would enable a viewer to set a television to lock out (or permit in) specified programs. Both systems are already in limited use.

The third system, which would permit the user to block all shows with a common rating, relies upon the fact that a broadcast signal is comprised of 525 horizontal lines but that only 483 are used to transmit the visual image. This leaves 42 lines in the "vertical blanking interval," ("VBI") of which 24 can be used to carry nonvideo data. n110 The FCC recently amended its regulations governing television signals specifically to permit optional transmission of "extended data services" ("EDS") - which could include program identification labels - in a designated field of the VBI. n111 Representative Markey's much-discussed V-Chip Bill requires television manufacturers to equip new sets with a simple and inexpensive computer chip that could be programmed by the user to block out all shows with a common rating so long as such a rating is transmitted as an EDS. n112 For example, while the "V" in "V-Chip" stands for "violence," observers have also envisioned an "S" rating for sex (or an "N" for nudity) and an "L" for language. n113 The V-Chip proposal, like a law to require television manufacturers (or cable operators) to provide channel-blocking or program-blocking mechanisms, is content-neutral on its face. n114

-Footnotes-

n110. See generally Edmund L. Andrews, A Chip That Allows Parents to Censor TV Sex and Violence, N.Y. Times, July 18, 1993, 3, at 14. For example, this space presently carries the closed captioning for hearing-impaired viewers.

n111. TV Transmission Standards, 58 Fed. Reg. 29,981 (1993) (amending 47 C.F.R. 73.682, 73.699).

n112. H.R. 2888, 103d Cong., 1st Sess. 3 (1993). It also requires manufacturers to install circuitry that would enable users to block signals by channel, program, and time slot (i.e., program-blocking technology). Id.

n113. Andrews, supra note 110, 3, at 14.

n114. Although the success of a V-Chip clearly depends upon programs being rated, Markey's bill does not mandate it. See H.R. 2888, 103d Cong., 1st Sess. 2 (1993) ("calling upon [television programmers] to protect the parental right to guide the television viewing habits of children by sending any adopted rating or warning system electronically with the program signal"). Markey has added that he would not require programmers to rate their shows. See Andrews, supra note 92, at A14. The assumption is that once the system is in place, public pressure would suffice to make programmers rate their violent programs.

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[\*1512]

This fact is not dispositive. As discussed, the distinction between content-based and content-neutral is not a fully accurate description of existing First Amendment jurisprudence. As Renton demonstrates, the content-based designation is over-inclusive in that a facially content-based regulation may be subjected to lesser scrutiny if "justified without reference to the content of the regulated speech." n115 More relevant for the instant inquiry, as a demarcation of the realm of regulations subject to most rigorous scrutiny, "content-based" is also underinclusive. In Professor Tribe's words, heightened "content-based" scrutiny applies to "a governmental action neutral on its face ... motivated by (i.e., would not have occurred but for) an intent to single out constitutionally protected speech for control or penalty." n116

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n115. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)) (emphasis supplied in Renton).

n116. Tribe, supra note 71, 12-3, at 794. Of course, an intent to single out a category of speech for control or penalty (or special benefit) need not be inspired by the communicative impact of the speech. A content-based restriction justified simply on the basis that a given subject matter is more (or less) important receives highest scrutiny. See, e.g., Police Dep't v. Mosley, 408 U.S. 92 (1972) (finding that ban against picketing that excepts labor picketing is content-based). Accordingly, the temptation to conflate the distinction between content-based and content-neutral with Tribe's two tracks should be withstood. See generally Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189 (1983) (elaborating on the differences between content-based and content-neutral regulations).

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The Court's decision last summer in TBS n117 provides the leading guidance in determining whether a facially content-neutral statute should be subjected to content-based scrutiny. TBS involved a challenge to the must-carry provision of the 1992 Cable Act, which requires cable systems to devote a specified portion of their channels to the transmission of local broadcast stations. The Court

determined with apparent ease that "the must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech." n118 The number of channels a cable operator must set aside for local full-power broadcasters n119 was dependent only upon the operator's channel capacity and could be neither increased nor decreased by considerations related to the content of the operator's programming. As the Court acknowledged, however,

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n117. 114 S. Ct. 2445 (1994).

n118. Id. at 2460.

n119. Different rules applied to the set-asides for low-power broadcasters. See id. at 2460 n.6. The majority's analysis and our analysis in text refers only to the requirement that cable operators set aside channels for full-power broadcasters.

-End Footnotes-

that the must-carry provisions, on their face, do not burden or benefit speech of a particular content does not end the inquiry. Our cases have recognized that even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys. n120

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n120. Id. at 2461.

-End Footnotes-

[\*1513]

The Court then split 5-4 over whether "Congress' purpose in enacting [the must-carry rules] was to promote speech of a favored content." n121 The majority held that it was not, finding that the congressional purpose was simply to preserve the economic viability of free broadcast television without regard for the content of programming broadcast television stations would air. n122 The dissenters disagreed. Pointing to extensive congressional findings that specifically extolled broadcast television for its commitment to provide local and public-affairs programming, the dissent concluded that Congress's "preference for broadcasters over cable programmers is justified with reference to content." n123

-Footnotes-

n121. Id.

n122. Id. (finding that "Congress' overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable").

n123. Id. at 2476 (O'Connor, J., concurring in part and dissenting in part). Because Congress incorporated its findings into the statute as enacted, the dissent noted that the "content-based justification appears on the statute's face." Id. at 2478 (O'Connor, J., concurring in part and dissenting in part). This fortuity should not distract from the fact that the speech restriction itself was facially content-neutral and that both the majority and dissent were directed by an inquiry into Congress' purpose in enacting the legislation.

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The fact that a facially content-neutral statute will be deemed content-based if the reviewing court determines that the legislature's purpose was to favor or disfavor speech of a particular subject matter encourages misdirection. Thus, writing in 1978 about simple channel-blocking systems, Krattenmaker and Powe observed that "the careful draftsman should be expected to emphasize" the government's "economic" interests in facilitating both energy conservation and "savings in billing costs for pay television subscribers from undesired or inadvertent use of the set." n124 While Krattenmaker and Powe cannot be faulted merely for predicting that legislators will "hedge their bets," so to speak, any implication that legislators should contrive artificial justifications for legislation in order to avoid constitutional scrutiny would be both troubling and, in this case, unnecessary.

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n124. Krattenmaker & Powe, supra note 14, at 1276. Although this writing long preceded TBS, an earlier case, United States v. O'Brien, 391 U.S. 367 (1968), also directs judicial inquiry into legislative purpose.

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A lockout regulation can be easily justified for a number of legitimate reasons, not just the curbing of viewership of television violence. After all, parents' concerns about what their children watch are not limited to violence; parents worry too about indecency, children's advertising, and the generally low quality of much that their children watch. And many are troubled that their kids simply spend too much time in front of the set. A properly designed lockout law - say, one that mandated installation of program-blocking and time-blocking circuitry - would respond to the range of parental concerns. It really [\*1514] would (in the language of pending legislation n125) "empower" parents to regulate all aspects of their children's viewing, not just whether, when, and how they watch violence.

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n125. See supra notes 8 & 12.

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Under TBS such legislation could be content-neutral. True, a lockout law could not plausibly be defended on the grounds that Congress had no idea that parents might use the system to reduce their children's viewing of violent programs. But even the TBS majority appreciated that, in passing the must-carry provisions, Congress was aware of some ways in which the content of benefitted broadcast stations would, in the aggregate, differ from that of programs to be

displaced. Hence, the dispositive question, it seems, is not whether Congress enacted the legislation with an awareness or expectation that its effects would be non-content-neutral, but whether such an awareness motivated, or was incidental to, passage of the legislation. If the government could convince a reviewing court that Congress's purpose or "overriding objective" in mandating lockboxes was not to reduce television violence, but to facilitate parental ability to supervise the television-watching habits of their children - whatever each parent's choices might be - then the law is content-neutral. Given Congress's history of responding to a variety of parental concerns about children's television, n126 such an argument would be more than plausible. Thus, a parental-empowerment justification for a facially content-neutral lockout regulation could be easily defended.

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n126. See, e.g., Children's Television Act of 1990, Pub. L. No. 101-437, Title I, 102, 104 Stat. 996 (1990) (codified at 47 U.S.C. 303a (Supp. III 1991) (limiting the number of commercial-minutes in children's programming and directing FCC to promulgate rules requiring broadcasters to air educational programming for children); Public Telecommunications Act of 1992, Pub. L. No. 102-356, 16(a), 106 Stat. 949, 954 (1992) (directing FCC to promulgate rule barring broadcast of indecent material from 6 a.m. to midnight); Pub. L. No. 100-459, 608, 102 Stat. 2186, 2228 (1988) (directing 24-hour ban on broadcast of indecent material). The D.C. Circuit has invalidated both of the indecency bans. See Action for Children's Television v. FCC, 11 F.3d 170 (D.C. Cir. 1993), vacated, and reh'g en banc granted, 15 F.3d 186 (D.C. Cir. 1994); Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1281 (1992).

-End Footnotes-

A still more vexing question is whether a government-imposed ratings-blocking system would be content-neutral. For those who favor government intervention to combat television violence, the appeal of such technology over a program-blocking system is obvious. Because a program-blocking system would require that parents make particularized decisions regarding which shows to block out (or allow in), it is likely to be used only rarely. A V-Chip system promises to curb violence more effectively because it enables a user to block out all disfavored programs (so long as they are rated) en gross. But it is precisely this feature that raises the possibility that a V-Chip regulation might be content-based even while other lockout systems would be content-neutral. A program-blocking system, recall, vests all [\*1515] choice in the user. A ratings-blocking system does not. While the user still enjoys ultimate control over whether to block a particular rating, somebody else decides what those ratings will be. And if that somebody is the government, then the regulation looks more content-based.

Since the utility of a ratings-blocking system requires both that the broadcaster or cable operator transmits rated programs and that the television set be configured to recognize the particular rating, either the television-programming or television-manufacturing industry could drive the standards. The rub comes if the law that mandates the system also directs what the ratings would be. But this rub is easily avoided if Congress enacts a "Chip" law but does not code it "V," i.e., if Congress requires the adoption of a rating system without specifying an exclusive list of ratings categories or

rating gradations within the categories. Thus done, the content of the ratings system ultimately adopted would be impossible to predict. Public pressure (especially the implicit threat of more drastic congressional action) might produce a multifaceted rating system to reflect more than just violence. We could expect such a system to identify a range of content elements (sex, nudity, violence, language, substance abuse, and infomercials, for instance) and distinguish among degrees. n127 The regulation will raise problems only if the government ordains the program characteristics upon which a lockout mechanism could operate, thereby disadvantaging speech by content or subject matter. n128

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n127. Cf. Salgado, supra note 96, at 525-26 (discussing the rating system developed by the Independent Video Programmers Association).

n128. Whether the pending "V-Chip" Bill, H.R. 2888, the "Television Violence Reduction Through Parental Empowerment Act of 1993," is in fact such a regulation is unclear. The relevant portion of that bill "Requires that (1) apparatus designed to receive television signals be equipped with circuitry designed to enable viewers to block the display of channels, programs, and time slots; and (2) such apparatus enable viewers to block display of all programs with a common rating." H.R. 2888, 103d Cong., 1st Sess. 3 (1993).

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The foregoing analysis also suggests that a law which mandates lockout technology but does not single out speech of any particular content or subject matter does not even come within the purview of the First Amendment. In other words, a regulation that imposes technological obligations upon television manufacturers that would enable users better to select among programs - without a government thumb on the scales - cannot be seen to require, proscribe, burden, or significantly affect speech. To be sure, any simple lockout law will affect speech in some manner. Its effect might even be non-content-neutral, as in TBS. That cannot, without more, violate the Constitution. [\*1516]

III. High- and Low-Value Speech

"Content-based regulations are presumptively invalid." n129 However, not all content-based regulations are treated the same for First Amendment purposes. The Supreme Court has long engaged in a process of "definitional" balancing, n130 affording lesser degrees of scrutiny to a few specified categories of content-based regulations. The locus classicus of the definitional approach is a single passage from Chaplinsky v. New Hampshire, n131 a 1942 decision that involved a criminal conviction under a state statute construed to proscribe words that "have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." n132 The Court sustained the conviction. It reasoned:

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n129. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992).

n130. The phrase is Professor Nimmer's. See Melville B. Nimmer, The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 Cal. L. Rev. 935, 942 (1968).

n131. 315 U.S. 568 (1942).

n132. Id. at 573.

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There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. n133

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n133. Id. at 571-72.

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Over the ensuing half century, Chaplinsky's two tiers have seen considerable revision. The Supreme Court has added commercial speech n134 and child pornography n135 to the categories of speech entitled to lesser protection. And it has abandoned the notion that abridgements of these "narrowly limited classes . . . raise [no] Constitutional problem." In place of Chaplinsky's in/out dichotomy, the Court has substituted a more complicated hierarchy of speech in which several narrowly circumscribed categories of expression - libel, fighting words, obscenity, child pornography, and commercial speech - have less "value" under the First Amendment and, consequently, enjoy somewhat reduced constitutional protection. n136 This [\*1517] Part of the Article explores whether televised violence is high- or low-value expression.

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n134. Valentine v. Chrestensen, 316 U.S. 52 (1942).

n135. New York v. Ferber, 458 U.S. 747 (1982).

n136. The precise levels or contours of the hierarchy cannot be identified with ease, for the Court has crafted a complex of category-specific rules. For example, "obscenity" is deemed to have no constitutional value and may be regulated subject merely to rational basis review. See, e.g., Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973). Nonmisleading "commercial speech" has intermediate value and is protected by a three-part test: (1) the state's interests must be substantial; (2) the challenged regulation must advance interests in a direct and material way; and (3) the extent of restriction on speech is in reasonable proportion to interests served. Board of Trustees v. Fox, 492 U.S. 469, 475-78 (1989); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980). And "libelous statements," although themselves arguably of no value, sometimes enjoy considerable First Amendment

protection to ensure that any particular regulation does not excessively chill high-value speech. See, e.g., Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50-55 (1988); see generally New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The Court has wavered on the question whether "libel" itself has any value. Compare Falwell, 485 U.S. at 52 and Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (stating that "there is no constitutional value in false statements of fact") with Sullivan, 376 U.S. at 279 n.19 (citing John Stuart Mill for the proposition that "even a false statement may be deemed to make a valuable contribution to the public debate").

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A. Violent Speech and Existing Categories

Violent programming (expression with violent themes and/or images) does not, without more, fall into any of the existing low-value categories. Fighting words are remarks uttered in a face-to-face confrontation that are inherently likely to provoke the listener to immediate violence. n137 Libel requires a false statement of fact. n138 Child pornography is material depicting sexual performances by children. n139 Commercial speech is expression that proposes a commercial transaction. n140 And obscenity is limited to a subcategory of sexually explicit material. n141

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n137. See, e.g., R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2559-60 (1992) (White, J., concurring); Cohen v. California, 403 U.S. 15, 20 (1971); supra note 133 and accompanying text.

n138. See supra note 136 (quoting Gertz).

n139. See generally Ferber, 458 U.S. at 749 (examining constitutionality of a New York criminal statute that prohibits persons from knowingly promoting sexual performances by children under the age of 16 by distributing material that depicts such performances).

n140. See, e.g., Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993). Consequently, the mere fact that television broadcasters and cable operators are (with few exceptions) commercial entities does not make their programming commercial speech. See Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (rejecting notion that movies deserve lesser First Amendment protection "because their production, distribution, and exhibition is a large-scale business conducted for private profit"). A different analysis might apply for violent television commercials. Cf. Weirum v. RKO General, Inc., 539 P.2d 36 (Cal. 1975) (holding that a radio station could be held liable in a wrongful death action for damages arising from an automobile accident caused by a promotional broadcast that induced two youths to speed to the site at which the station had announced it would give away prize money).

n141. See Miller v. California, 413 U.S. 15, 24 (1973); Cohen v. California, 403 U.S. 15, 20 (1971) ("Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic."); Roth v. United States, 354 U.S. 476, 487 (1957).

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[\*1518]

B. Should There be a New Low-Value Category for Violent Speech?

Because there can be no serious contention that televised violence falls within any existing category of low-value speech, n142 the more interesting question is whether violent expression might constitute a new low-value category of its own. Chaplinsky provides little guidance. From the Court's brief explanation of low-value speech, one may glean three possible justifications for the categories of unprotected speech identified in Chaplinsky: tradition; no perceived value for certain speech; and a distinction between speech and conduct, i.e., certain words that "by their very utterance inflict injury" are more conduct than speech. However, the Court's subsequent addition of commercial speech and child pornography to low-value status undermined Chaplinsky's rationales. Accordingly, the prevailing contemporary understanding is that a category of speech will not lose full protection under the Constitution absent a persuasive demonstration that such expression fails to serve the purposes of the First Amendment. n143

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n142. For a fuller development of much of the preceding analysis, see Krattenmaker & Powe, supra note 14, at 1178-90.

n143. See, e.g., Tribe, supra note 71, at 836; Stone, supra note 116, at 194.

-----End Footnotes-----

1. Not All Violent Expression Can Be Low Value. - While it is well beyond the scope of this Article to plumb the historical and theoretical rationales for the constitutional protection of free speech, the Court's precedents make clear beyond cavil that some types of violent programming fulfill the core purposes of the First Amendment and thus warrant full protection. To begin with, the self-governance rationale for the First Amendment - what the Court has termed its "central meaning" n144 - must surely ensure that any programming that bears upon contemporary political and civic affairs is high value regardless of any violent content. In seeming consequence, Senator Paul Simon, one of the leaders in the congressional drive to curb televised violence, has acknowledged that news shows should be exempt from any conceivable regulation. n145 But news is just the tip of the iceberg. Real-life cop shows, for instance, surely must be high [\*1519] value. n146 And even the narrowest conception of "political" expression likely includes much historical and documentary drama, no matter how violent.

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n144. New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964); see also, e.g., Burson v. Freeman, 112 S. Ct. 1846, 1850 (1992) ("Whatever differences may exist about interpretations of the First Amendment, there is practically, universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." ) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

n145. See Thomas G. Krattenmaker & Lucas A. Powe, Jr., *Regulating Broadcast Programming* 124 & n.113 (1994) (citing *Larry King Live: Transcript #883*, at 4 (CNN television broadcast, Aug. 2, 1993)).

n146. Cf. *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) ("The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.").

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Fortunately, we need not enter the debate over the extent to which the First Amendment must protect artistic expression that is nonpolitical on its face in order to serve the political underpinnings of the constitutional free speech guarantee. n147 Even if "central," the self-governance rationale does not constitute the sole meaning of the First Amendment. Whether it has relied upon a broad conception of the "political," a more general "marketplace of ideas" rationale, or the value of free expression for individual self-fulfillment (or any combination of these and other theories justifying freedom of expression), the Court has repeatedly refused to afford lesser First Amendment protection to "mere" entertainment. n148 This is not to suggest that any expression that comes within the category of "entertainment" is fully protected, for some might press to claim such status for obscenity. Rather, it is to say that the mere fact that expression is produced solely for entertainment does not reduce its value.

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n147. Compare, e.g., Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245, 255-57 (advancing an expansive view of the types of communication that serve the self-governance rationale of the First Amendment) with Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 26-28 (1971) (limiting the protection of expression under the self-governance rationale to speech that is explicitly political).

n148. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection."); *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952); cf. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) ("The First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.") (citing cases); *Miller v. California*, 413 U.S. 15, 24 (1973) (stating that in finding a work to be obscene, a court must consider whether, "taken as a whole, [it] lacks serious literary, artistic, political, or scientific value") (emphasis added).

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It deserves emphasis, then, that the Court has not actualized into current doctrine its occasional dicta suggesting that political speech garners the fullest First Amendment protection. n149 Existing jurisprudence does not describe a continuum of First Amendment scrutiny. Rather, all speech - regardless of its content - enjoys complete (though, not absolute) constitutional protection unless it falls into a specific narrowly delineated category. n150

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n149. See, e.g., *Boos v. Barry*, 485 U.S. 312, 318 (1988).

n150. See, e.g., *United States v. United States Dist. Court*, 858 F.2d 534, 542 (9th Cir. 1988) (Kozinski, J.) ("Unless and until the Supreme Court speaks otherwise, we are bound to the view that the constitutional wall against government censorship protects this nether region of public discourse [nonobscene sexually explicit material] as fully as the heartland of political, literary and scientific expression and debate.").

Of course the wisdom of this approach is beyond the scope of this Article. See generally Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 Sup. Ct. Rev. 285 (weighing a broad, uniform First Amendment jurisprudence against a hierarchy of content-based categories).

-End Footnotes-

[\*1520]

The decision in *Winters v. New York* n151 is the closest that the Court has come to holding that entertainment depicting violence is entitled to full First Amendment protection. *Winters* involved the criminal prosecution of a bookseller under a state law that proscribed the sale or distribution of "any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." The defendant had been convicted of possession of detective magazines with intent to sell, and the New York Court of Appeals had affirmed, construing the statutory prohibition to extend to collections of criminal stories that are "so massed as to become vehicles for inciting violent and depraved crimes against the person." n152 The Supreme Court reversed the conviction. In so doing, it squarely rejected the claim that violent entertainment is outside of the First Amendment:

-Footnotes-

n151. 333 U.S. 507 (1948).

n152. *Id.* at 513 (quoting *People v. Winters*, 63 N.E.2d 98, 100 (N.Y. 1945)).

-End Footnotes-

We do not accede to [the] suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature. n153

Lower courts have subsequently held that violent entertainment is high-value speech. n154

-Footnotes-

n153. Id. at 510. It ought not to be objected that Winters establishes only that violent entertainment is within the First Amendment, not that it is high value. See generally Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265 (1981) (distinguishing the concepts of coverage and protection under the First Amendment). Appreciation of that distinction long postdates Winters itself. Additionally, the Court specifically stated that the violent pictures and stories at issue were "as much entitled to the protection of free speech as the best of literature" - a category that the Court, then as now, surely understood to be high value.

n154. See, e.g., Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 688 (8th Cir. 1992); Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199, 204-06 (S.D. Fla. 1979); Sovereign News Co. v. Falke, 448 F. Supp. 306, 394 (N.D. Ohio 1977), remanded on other grounds, 610 F.2d 428 (6th Cir. 1979), cert. denied, 447 U.S. 923 (1980); see also American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986) ("Violence on television ... is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.") (dicta).

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2. Is Some Subset of Televised Violence Low-Value Speech? - Even if the category of televised violence may not be assigned a position of low value, a proponent of restrictions on violent programming might nonetheless argue that some subset of violent entertainment would be deserving of lesser protection. Some of it, the argument would go, is so worthless, so utterly without value for self-governance, individual self-fulfillment, and the "search for truth," that it does not warrant the First Amendment's full solicitude. n155 That is, even if violent entertainment on television is presumptively high value, the Court could draw lines around some subset thereof, call that low value, and then subject regulations of that speech to lesser scrutiny. As a general matter, this is an easy argument to advance in light of some of the awful material now seen in the movies and on television. Indeed, Winters itself can be read to support the approach. Instead of basing its reversal on the grounds that the expression at issue was constitutionally protected, the Court overturned on due process grounds, holding that the state court's construction of the statute left it too vague to sustain a criminal conviction. n156

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n155. Cf. Jefferson Graham, What is Violent? Definitions that Defy Logic, USA Today, Feb. 17, 1994, at 3D (characterizing much violent television programming as "junk," "unwatchable," and "sleazy").

n156. Winters, 333 U.S. at 518-19.

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Were the Court to recognize a low-value subcategory of violent expression, obscenity provides the obvious analog. After it first held, in Roth v. United

States, n157 that "obscenity is not expression protected by the First Amendment," n158 the Court struggled for sixteen years to identify the material that might constitutionally be regulated or prohibited as obscene. n159 Its 1973 definition from Miller v. California n160 still governs. Material may not be found obscene unless: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts sexual conduct in a way that would be patently offensive to an average member of the community; and (3) the work, taken as a whole, lacks serious literary, artistic, scientific, or political value. n161 Thus, Congress might try to define a low-value category of violence by adapting the Court's three-part test for obscenity to cover violence instead of sex. In fact, at least one state, Missouri, recently took precisely this tack in a statutory ban on the sale or rental of vio- [\*1522] lent videotapes to minors. n162 Such an approach, however, faces at least two substantial objections.

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n157. 354 U.S. 476 (1957).

n158. Id. at 492.

n159. For a brief and insightful account, see Harry Kalven, Jr., A Worthy Tradition 33-53 (1988).

n160. 413 U.S. 15 (1973).

n161. Id. at 24.

n162. See Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992).

-End Footnotes-

First, it is normally understood that the First Amendment was designed to foreclose regulation of speech based on determinations that the expression is offensive or lacks value. Beyond the obscenity context, the Court has announced steadfastly "that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," n163 and has refrained from giving force to community notions regarding the intrinsic worth of particular speech. As Justice Harlan wrote for the Court in Cohen v. California, n164 two years prior to Miller, "it is ... often true that one man's vulgarity is another's lyric." n165 The First Amendment may permit the government to abridge speech on the basis of the harm it might cause, but not on the grounds that a majority does not like it or deems it worthless. n166

-Footnotes-

n163. Texas v. Johnson, 491 U.S. 397, 414 (1989) (citing cases).

n164. 403 U.S. 15 (1971).

n165. Id. at 25; see also Winters, 333 U.S. at 510 ("What is one man's amusement, teaches another's doctrine.").

n166. The difference between holding a given speech unprotected because it is harmful and because it lacks value is nicely manifested in the several opinions in *New York v. Ferber*, 458 U.S. 747 (1982). Compare *Ferber*, 458 U.S. at 756-66 (emphasizing both the harmfulness and lack of value of child pornography) with *id.* at 774-75 (O'Connor, J., concurring) (suggesting that the harms caused by child pornography might justify a ban on its distribution regardless whether the material has other value) and *id.* at 776 (Brennan, J., concurring) (arguing that the distribution ban would violate the First Amendment if applied to works of "serious literary, artistic, scientific, or medical value").

Of course, the idea that value is an improper basis for abridging speech undermines existing categories of lesser-protected speech as well as it does a conceivable category of lesser-protected violent entertainment. Most conspicuously, it served as the basis for Justices Douglas and Black's unwavering resistance to the Court's obscenity jurisprudence, a view with which Justice Scalia at one time expressed sympathy. See, e.g., *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413, 427-28 (1966) (Douglas, J., concurring); *Roth*, 354 U.S. at 511-14 (Douglas & Black, JJ., dissenting); *Pope v. Illinois*, 481 U.S. 497, 504-05 (1987) (Scalia, J., concurring); see also *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1517-21 (1993) (Blackmun, J., concurring) (disapproving intermediate-value status for nonmisleading commercial speech proposing a legal transaction). But see *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464, 473 (1994) (Scalia, J., dissenting).

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Second, any line demarcating low-value violence must avoid the problem of vagueness. It is, of course, a fundamental requirement of constitutional and criminal law that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." n167 Moreover, the vagueness doctrine applies with particular force when First Amendment freedoms are at stake, lest the law chill protected speech. n168 As we have seen, in *Win- [\*1523] ters* the Supreme Court struck down on vagueness grounds a New York statute construed by the state court to prohibit "criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes." n169

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n167. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

n168. See, e.g., *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

n169. *Winters*, 333 U.S. at 518.

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Similarly, in *Interstate Circuit, Inc. v. City of Dallas*, n170 the Court reviewed a licensing statute that empowered a state film licensing board to classify a movie as "not suitable for young persons" if it describes or portrays "brutality, criminal violence or depravity ... or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be ...

likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest." n171 The Court invalidated the ordinance, specifically holding the term "sexual promiscuity" to be unconstitutionally vague. n172 The Court continued:

-Footnotes-

n170. 390 U.S. 676 (1968).

n171. Id. at 681.

n172. Id. at 687-88; see also id. at 683 & n.10 (reviewing other examples of unconstitutionally vague licensing standards).

-End Footnotes-

Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children. n173

Following Interstate Circuit, the Eighth Circuit invalidated the Missouri ban on distribution of violent videotapes to minors in part on the grounds that the statutory term "violence" was unconstitutionally vague. n174

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n173. Id. at 689.

n174. Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 689-90 (8th Cir. 1992).

-End Footnotes-

In thinking about this issue, there is another point to keep in mind. However we define violence, the need remains not only to avoid vagueness, but to distinguish the low-value violence from the high. It is not clear how that would be done. One might look to the Miller test, and the concepts of "prurient interest," "patently offensive," and "serious value" used to define obscenity. But these concepts have proven difficult to apply in obscenity cases, and they would pose even more problems in cases seeking to distinguish between high- and low-value violence. One problem is that there is nothing even approaching a consensus on low-value violence. Indeed, some who propose to regulate televised violence save their most vitriolic attacks for precisely the types of programs - news, reality-based cop shows, talk shows, and historical docudramas n175 - whose high value [\*1524] (within the meaning of First Amendment jurisprudence) is most assured.

-Footnotes-

n175. See, e.g., Kolbert, supra note 91; O'Connor, supra note 49; cf. Prettyman & Hook, supra note 6, at 331 n.55 (noting the prevalence of copycat

criminal incidents following news broadcasts of particular crimes).

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Furthermore, given that this nation traditionally has been more hostile to sexually explicit material than to violent matter, we assume that low-value violent material would have to be at least as graphic and beyond the mainstream as sexually explicit material is to be obscene. n176 Put otherwise, there must be full First Amendment protection for all violent speech short of the violence equivalent of obscenity. n177 What that equivalent would be is, of course, impossible to say with precision. However, whether the line between high- and low-value violence narrowly tracks the Miller obscenity test or is just functionally comparable, the most violent programs in televised media - say NYPD Blue n178 and uncut versions of The Terminator or Die Hard, or other such movies - arguably fall within the sphere afforded full protection.

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n176. To be sure, there has been no greater consensus in the Supreme Court regarding the proper level of protection to be afforded sexually explicit material short of the obscene than there has been regarding the proper constitutional status of obscenity itself. See generally United States v. United States Dist. Court, 858 F.2d 534, 541-42 (9th Cir. 1988) (providing a succinct history of cases). The controversy apparently continues. Compare, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (plurality) ("Nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.") with Sable Communications v. FCC, 492 U.S. 115, 126 (1989) (applying exacting content-based scrutiny to regulation of indecent but not obscene dial-a-porn services). Present doctrine provides full First Amendment protection to nonobscene speech. But see R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2564 (1992) (Stevens, J., concurring) (claiming that "nonobscene, sexually explicit speech" is a "sort of second-class expression" on par with commercial speech in the Court's First Amendment hierarchy).

n177. The fact that, unlike most sexually explicit expression, some televised violence depicts conduct that is itself illegal does not direct a contrary conclusion. Such an argument would suggest that what makes violent speech worse than sexually explicit speech or, say, profane, blasphemous, and plain offensive forms of modern art, is not the harm or offense that the various types of speech cause, but rather the legality or illegality of the conduct depicted or evoked. To be sure, "the First Amendment does not protect violence." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982). But representations of violence are not themselves violence. This argument is a classic non sequitur. The map is not the territory. See American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985) (stating that "the image of pain is not necessarily pain").

n178. NYPD Blue, a weekly series from the Emmy-winning producer Steven Bochco, is generally considered the most violent program on network television. See, e.g., Kim, supra note 3, at 1397 n.56; O'Connor, supra note 49, at II.26. Because the violence in movies far outpaces that which is made for television, the most violent fare on cable are Hollywood feature films when shown uncut. See id.

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There is another side to this argument, however. Any reasonable person must concede that the Court's definition of "obscenity" is a classic example of a vague regulation, yet we tolerate it. And it is tolerated because, as a society, we have tended to believe that certain material is so outrageous as to be beyond the pale of free expression. [\*1525] With this in mind, Justice Stewart's "I know it when I see it" n179 approach to defining obscenity arguably is no less apt in defining gratuitous violence: "we don't know it until we see it" may be a better way of putting it. If the social science studies continue to connect portrayals of violence to violent criminal activity, we may reach the point where society will tolerate a measure of regulatory vagueness to gain a measure of security in our well-being.

-Footnotes-

n179. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

-End Footnotes-

IV. Content-Based Regulation of High-Value Speech: Clear and Present Danger, and Beyond

The widespread absolutist conception holds that the First Amendment proscribes content-based restrictions of high-value speech. In the much-quoted words of one Supreme Court opinion, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." n180 Surely, however, this is hyperbole. The task is to identify the standards by which television violence might be regulated notwithstanding that it is high-value speech.

-Footnotes-

n180. *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972); see also *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.").

-End Footnotes-

For courts and commentators who have analyzed regulations of media violence, the initial, and sometimes sole, move has been to apply the clear and present danger test of *Brandenburg v. Ohio*. n181 We conclude in subpart A (along with the overwhelming consensus) that television violence cannot be regulated as a clear and present danger. But that, we shall argue, is not the end of the inquiry. Subpart B develops alternative standards that more properly govern the constitutionality of regulations of televised violence.

-Footnotes-

n181. 395 U.S. 444 (1969).

-End Footnotes-

A. Clear and Present Danger: Brandenburg and Television Violence

Brandenburg involved the filming of a Ku Klux Klan rally in rural Ohio at which participants spouted the customarily outrageous racist Klan invective. After the film was broadcast, the state of Ohio convicted the local Klan leader, a major speaker at the rally, under a state criminal syndicalism act making it illegal to advocate "the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." n182 A unanimous Court reversed the conviction. It announced in a per curiam opinion that the First Amendment does "not permit a [\*1526] State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." n183 On its face the Brandenburg standard n184 appears to establish four conditions that must be satisfied in order for the government to restrict speech because of its tendency to cause harm. The speech must be: (1) advocacy (2) directed to inciting or producing (3) imminent lawless action and (4) likely to incite or produce such action.

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n182. Brandenburg, 395 U.S. at 444-45.

n183. Id. at 447.

n184. Whether Brandenburg is a species of the "clear and present danger" test first enunciated in Schenck v. United States, 249 U.S. 47 (1919), or a replacement has generated some debate. See, e.g., Tom Hentoff, Note, Speech, Harm, and Self-Government: Understanding the Ambit of the Clear and Present Danger Test, 91 Colum. L. Rev. 1453, 1455 n.11 (1991) (citing varying views).

We agree with Professor Smolla that the nomenclature is irrelevant so long as the elements of the test are properly understood. See Smolla, supra note 54, 4.02(3)(b)(ii). Unless otherwise noted, we will use the terms "clear and present danger test" and "the Brandenburg test" interchangeably.

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Brandenburg has spawned a vast and rich literature. n185 For purposes of the present inquiry, however, it is unnecessary to parse the test or scrutinize the commentary on the meaning of "clear and present danger." It is apparent that the incitement element of the Brandenburg test, alone, fails to capture government regulation of television violence. Simply put, the violent fare on television does not explicitly urge viewers to commit the evils with which the legislature may be concerned. Nor can such intent reasonably be attributed to television executives and producers. n186 Largely for this reason, courts and commentators have concluded with near unanimity that televised portrayals of violence are not "directed to inciting or producing imminent lawless action." Consequently, Brandenburg does not help would-be regulators. n187

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n185. See, e.g., Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan. L. Rev. 719 (1975);

Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 Cal. L. Rev. 1159 (1982); Hentoff, *supra* note 184; Staughton Lynd, *Comment, Brandenburg v. Ohio: A Speech Test for All Seasons?*, 43 U. Chi. L. Rev. 151 (1975).

n186. Of course, our conclusion that *Brandenburg* does not address governmental regulation of television violence should not be read to suggest that programmers could air material "directed to inciting or producing" violent behavior. The mere fact of its being telecast would not immunize the programming from regulation under *Brandenburg*.

n187. Several courts have visited the issue in tort suits against media entities to recover for harms caused when television programs or other entertainment allegedly induced viewers either to harm themselves or to commit crimes against others. All that have invoked clear and present danger analysis have denied recovery. See Campbell, *supra* note 14, at 447-53 (discussing cases); Prettyman & Hook, *supra* note 6, at 378-79 & nn.264-69 (same); see also *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1021-23 (5th Cir. 1987). Commentators have likewise concluded that *Brandenburg* permits neither tort suits for media-related imitative violence, see, e.g., Prettyman & Hook, *supra* note 6, at 382; Redish, *supra* note 185, at 1179 n.90; Sims, *supra* note 14, at 256-62; but see Hilker, *supra* note 14, at 570-71, nor other forms of governmental regulation of televised violence. See Krattenmaker & Powe, *supra* note 145, at 134; Krattenmaker & Powe, *supra* note 14, at 1191-96.

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[\*1527]

B. Toward "Most Exacting Scrutiny"

1. Beyond Clear and Present Danger. - The ease and certainty with which most commentators have concluded that television violence is not a "clear and present danger" within the meaning of the Court's case law have led many to question whether *Brandenburg* is even the appropriate test. n188 The better view, surely, is that it is not. As a matter of historical fact, the Court developed its clear and present danger jurisprudence in the narrow context of restrictions of speech that incite violence and illegal action as a political strategy. n189 Thus, advocacy of political action is not an element of the test but a precondition for its application. n190

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n188. See, e.g., Prettyman & Hook, *supra* note 6, at 382; Sims, *supra* note 14, at 262; Weingarten, *supra* note 14, at 747-49.

n189. See generally Kalven, *supra* note 159, at 119-236 (emphasizing this theme).

n190. To be sure, the Court has muddled the issue by sending mixed and confusing signals as to whether the clear and present danger test applies outside of political advocacy, as for instance, in the area of press coverage of judicial proceedings and pretrial publicity, see, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842-45 (1978); *Gentile v. State Bar*, 501 U.S. 1030 (1991), and the heckler's veto. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 409-10 (1989).

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Consequently, regulations of television violence should not (except in the most unusual circumstances not here relevant) be measured by Brandenburg in the first place. As we have noted, the programs with which the public and congressional leaders are concerned might be harmful and might be without much value, but it requires stretching the language farther than the developers of the test intended to conclude that they "advocate" aggression, violence, or law-breaking. The question becomes whether another test might apply or whether clear and present danger is the only basis upon which content-based regulations of high-value speech might constitutionally be justified (in which latter case, a conclusion that the test does not apply is functionally equivalent to a determination that the test applies but is not satisfied).

The notion that Brandenburg does not cover all content-based regulations is not new. At least a decade ago, commentators suggested that the standards governing incitement might prove to be solely one manifestation of a general compelling interest test. n191 And [\*1528] the development of the Supreme Court's First Amendment jurisprudence, especially during the 1980s, has vindicated that view. While the Court has generally refrained from invoking the clear and present danger test when advocacy of lawbreaking is not involved, it has not thereby summarily invalidated regulations of high-value speech. Rather, it has applied "most exacting scrutiny." n192

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n191. See, e.g., Redish, *supra* note 185, at 1182-83; Schauer, *supra* note 150, at 305 (suggesting it "possible that Brandenburg is representative rather than exclusive").

An appreciation of this possibility is frustrated if one subscribes to the minority view that the clear and present danger test demarcates a category of low-value speech rather than constituting a test for restriction of high-value speech. See, e.g., *Herceg v. Hustler Mag., Inc.*, 814 F.2d 1017, 1020 (5th Cir. 1987); *id.* at 1026 (Jones, J., concurring in part, dissenting in part); *Prettyman & Hook*, *supra* note 6, at 370; *Stone*, *supra* note 116, at 194; *Kim*, *supra* note 3, at 1406. Of course, whichever view one takes, the result is the same: if the test is satisfied, the speech at issue can be suppressed consistent with the First Amendment. Still, it will much clarify matters once we determine that the test does not apply to have recognized that the paradigmatic speech generally subject to the clear and present danger test is political advocacy and thus unquestionably high value. Hence, Professor Schauer's insistence that, although "there are numerous doctrinal paths to nonprotection," we can best come to understand "the increasingly complex nature of the First Amendment" by keeping the paths analytically distinct. Schauer, *supra* note 150, at 299.

n192. E.g., *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994); *United States v. Eichman*, 496 U.S. 310, 318 (1990); *Texas v. Johnson*, 491 U.S. 397, 412 (1989); *Boos v. Barry*, 485 U.S. 312, 321 (1988). Justice Kennedy, on occasion, has objected to this conclusion. See, e.g., *Burson v. Freeman*, 112 S. Ct. 1846, 1858-59 (1992) (Kennedy, J., concurring) (explaining that another such exception should apply when abridgement of speech is necessary to accommodate a conflicting constitutional right); *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 502 U.S. 105, 124-28 (1991) (Kennedy, J.,

concurring) (urging that clear and present danger test should remain one of very few narrow exceptions to absolute prohibition against content-based regulations of high-value speech).

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2. Articulating a New Test. - Although the Supreme Court has determined that the First Amendment affords government wider latitude to impose content-based regulations of high-value speech than the incitement test alone provides, it has not precisely identified what the First Amendment requires in any given case or articulated a satisfactory general test. Accordingly, it is crucial to pay close attention to the Court's numerous explications of what "most exacting scrutiny" entails. n193

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n193. Dicta in some opinions suggests that, even within the universe of content-based regulations of high-value speech, the level of scrutiny might be affected by such considerations as whether the speech is in a public forum and the degree to which the speech is on core political matters. See, e.g., Boos, 485 U.S. at 321 ("Our cases indicate that as a content-based restriction on political speech in a public forum, [the instant regulation] must be subjected to the most exacting scrutiny.") (emphasis in original). Supreme Court case law squarely rejects the implication. The Court has consistently applied most exacting scrutiny to content-based regulations of nonpolitical high-value speech. See, e.g., Simon & Schuster, 502 U.S. 105, 115-21 (1991) (stories about crime); Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989) (dial-a-porn phone services). Indeed, in R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2545-50 (1992), the Court applied exacting scrutiny to a content-based distinction drawn among types of fighting words, which the Court acknowledged is low-value speech.

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At its simplest, exacting scrutiny appears identical to the familiar strict scrutiny test under the Due Process and Equal Protection Clauses of the Fourteenth Amendment: the challenged regulation must be "narrowly tailored to serve a compelling state interest." n194 In [\*1529] a slightly more stringent wording, it would require a "precisely drawn means of serving a compelling state interest." n195 In another formulation, "exacting scrutiny" demands that the State demonstrate " "a subordinating interest which is compelling' " and " means "closely drawn to avoid unnecessary abridgment.' " n196 Reworked again: "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." n197 Finally, in perhaps the standard's most common phrasing, " "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.' " n198

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n194. E.g., Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657 (1990) (citing Buckley v. Valeo, 424 U.S. 1, 44-45 (1976) (per curiam)); United States v. Grace, 461 U.S. 171, 177 (1983) (stating that content-based restrictions

"will be upheld only if narrowly drawn to accomplish a compelling governmental interest").

In fact, at least one respected commentator refers to the standard of review to be applied to content-based restrictions of high-value speech as "strict scrutiny." See Smolla, supra note 54, 3.03[1].

n195. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 540 (1980).

n196. Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978) (quoting cases).

n197. Sable, 492 U.S. at 126.

n198. Simon & Schuster, 502 U.S. at 118 (quoting Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)); see also R.A.V., 112 S. Ct. at 2549-50; Burson, 112 S. Ct. at 1851; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Widmar v. Vincent, 454 U.S. 263, 270 (1981); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982) ("necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest"); Frisby v. Schultz, 487 U.S. 474, 481 (1988) (quoting Perry, 460 U.S. at 45); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979) (content-based abridgement is unconstitutional "absent a need to further a state interest of the highest order").

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The varied articulations indicate that "exacting scrutiny" contains at least two distinct prongs: a "compelling interest" component and a "narrowly tailored" or "precisely drawn" one. For our inquiry into the constitutionality of regulations of television violence we must parse these elements closely. n199

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n199. It is worth noting that the Court's approach is not really a balancing test. Under exacting scrutiny, one side of the scale is, at least in theory, assigned a fixed weight. A limited-tier First Amendment jurisprudence that treats all speech outside of a few narrow categories as equally high value, see generally supra Part III, strongly suggests an approach such as the Court has developed. It does not, however, necessitate it. The Court could apply a uniformly strict balancing formula to all regulations of high-value speech, while crafting more lenient rules (of either a categorical or balancing nature) for low-value expression.

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(a) "Compelling interest." - In applying the "compelling interest" prong, the state bears the burden to advance the interest(s) that the challenged regulation is purported to serve. n200 Whether one or more is "compelling" is simply a value judgment to be made by the [\*1530] court. n201 If the court deems the interest not to be compelling, the inquiry ends there: the content-based regulation is unconstitutional. n202

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n200. See, e.g., Bellotti, 435 U.S. at 786 (citing Elrod v. Burns, 427 U.S. 347, 362 (1976)).

n201. For a flavor of the untethered subjectivism that a judicial inquiry into "compellingness" entails, see TBS, 114 S. Ct. at 2478 (O'Connor, J., dissenting in part):

The interest in localism, either in the dissemination of opinions held by the listeners' neighbors or in the reporting of events that have to do with the local community, cannot be described as "compelling" for the purposes of the compelling state interest test. It is a legitimate interest, perhaps even an important one - certainly the government can foster it by, for instance, providing subsidies from the public fisc - but it does not rise to the level necessary to justify content-based speech restrictions....

The interests in public affairs programming and educational programming seem somewhat weightier, though it is a difficult question whether they are compelling enough to justify restricting other sorts of speech.

n202. Because the requirement of narrow tailoring is so stringent, and so often proves fatal, it is most common for the Court to assume arguendo that the asserted interest is compelling and then to invalidate the regulation as underinclusive (regulation does not satisfactorily advance the interest), overbroad (regulation abridges too much speech), and/or overly burdensome (regulation places too great a restriction on the speech that it regulates).

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If the court deems the government's stated interest to be compelling, it must then determine whether the challenged regulation in fact serves the interest. If it fully serves the interest, the compelling interest prong is satisfied, and the reviewing court can turn to the "narrowly tailored" component. If the regulation does not serve the asserted interest at all, it is unconstitutional. In a number of situations, however, a regulation will appear to serve the state's compelling interest, but only partially. This is the place for underinclusiveness review, an analysis that likely would bear significance for any regulation of television violence.

In one sense, "underinclusive" is a way of describing particular regulations that provoke content-based scrutiny because they restrict less speech than they otherwise could. n203 Once within exacting scrutiny, however, courts also frequently employ an underinclusiveness inquiry to determine whether a given regulation satisfactorily serves the interest that the state purports to advance. If a speech restriction leaves unregulated significant alternative sources of the harm sought to be remedied, a court will reason that the underinclusiveness either belies the state's avowed objective, n204 or establishes that, in practice, [\*1531] the regulation will not adequately serve the state's putatively compelling interest. n205

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n203. See generally Elena Kagan, The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion, 1992 Sup. Ct. Rev. 29. This is the situation exemplified by a regulation that excludes a certain category of speech from

what would otherwise be a permissible time, place, and manner restriction, thereby subjecting the regulation to exacting content-based scrutiny. In *R.A.V.*, for instance, the Court applied exacting scrutiny to a hate-speech ordinance only because the regulation proscribed some, but not all, fighting words. The majority denied that it was engaging in some sort of "underinclusiveness" analysis. 112 S. Ct. at 2545.

n204. See, e.g., *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2043-44 (1994); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 677-78 (1990) (Brennan, J., concurring); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 396 (1984); *Bellotti*, 435 U.S. at 793 ("The exclusion of Massachusetts business trusts, real estate investment trusts, labor unions, and other associations undermines the plausibility of the State's purported concern for the persons who happen to be shareholders in the banks and corporations covered by [the statute].").

n205. The Court's opinions in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), and *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), are illustrative. In *Daily Mail* the Court invalidated a state criminal statute that prohibited newspapers from publishing, without the consent of the juvenile court, the name of any youth charged as a juvenile offender. It reasoned that the application of the ban only against newspapers (and not against, for example, the electronic media) could not serve the state's arguably compelling interest in protecting the anonymity of juvenile offenders in order to promote their rehabilitation. See *Daily Mail*, 443 U.S. at 104-05; *id.* at 110 (Rehnquist, J., concurring in the judgment).

*Florida Star* involved similar facts. A state law barred "instruments of mass communication" from publishing the name of a victim of sexual assault. *Florida Star*, 491 U.S. at 526 (quoting Fla. Stat. ch. 794.03 (1987)). The Court held, *inter alia*, that the statute's failure to prohibit any disclosure by private individuals prevented the state from "satisfactorily accomplishing its stated purpose" of protecting the privacy of sexual assault victims. *Id.* at 541; see also *id.* at 541-42 (Scalia, J., concurring in part) ("[A] law cannot be regarded as protecting an interest 'of the highest order,' ... and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.") (quoting *Daily Mail*, 443 U.S. at 103). Cf. *City of Cincinnati v. Discovery Network*, 113 S. Ct. 1505 (1993) (engaging in a similar form of analysis under intermediate scrutiny for regulations of commercial speech).

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Underinclusiveness review has thus encouraged a slight recasting of the compelling interest prong: the challenged regulation must substantially advance a compelling interest. n206 Although helpful, this formulation is not precisely correct. The fact that a regulation does not "substantially advance" the state's proffered interest should not necessarily prove fatal. If the state's interest is to reduce a given harm, a speech restriction that will reduce the harm by, say, ten percent should probably not be termed "substantial." However, if the harm is especially grave, a ten percent reduction might well be of considerable social value. This means that in situations where a speech restriction only imperfectly advances government's stated interest - and we can anticipate that regulations of televised violence are likely to fall into this category - the compelling interest prong of exacting scrutiny rightly requires only that

government's interest in the expected limited realization of its stated objective itself be compelling. Thus, content-based restrictions applied only to a limited set of speakers will not necessarily fall under the view that they "simply cannot be defended on the ground that partial prohibitions may effect partial relief." n207 Instead, the regulation must accomplish - rather than merely "serve" - a compelling interest. n208

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n206. See, e.g., supra note 205 (quoting Florida Star); see also Bellotti, 435 U.S. at 795; NAACP v. Alabama, 357 U.S. 449, 464 (1958).

n207. Florida Star, 491 U.S. at 540.

n208. See supra note 194 (quoting the formulation from United States v. Grace, 461 U.S. 171 (1983)).

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[\*1532]

(b) "Narrowly tailored." - Second, a regulation must be narrowly tailored to achieve its compelling objective. Although the Court tends to use terms like "narrowly tailored" and "least restrictive means" indiscriminately, case law reveals that this component of exacting First Amendment scrutiny is comprised of two distinct elements. First, the regulation must restrict no more speech than is necessary to achieve its end. n209 It must, that is, be "precisely drawn"; put negatively, it may not be overinclusive or overbroad. n210 Additionally, it must impose no greater infringement upon the affected speech than is necessary. n211 The means chosen must be the "least burdensome" possible. The narrowly tailored prong is thus concerned with both the scope and degree, or breadth and depth, of speech restriction. n212

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n209. See, e.g., Simon & Schuster, 502 U.S. at 122 (invalidating law that requires criminals to escrow income from works describing their crimes on the ground that, although it serves compelling interest in ensuring compensation of victims, it is not narrowly tailored because it "clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated"); Frisby v. Schultz, 487 U.S. 474, 485 (1988) (stating that "statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy"); FCC v. League of Women Voters of Cal., 468 U.S. 364, 392-95 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607-09 (1982) (holding that blanket statutory exclusion of press and public from trials of sex offenses involving victims under the age of 18 is not narrowly tailored to serve the compelling state interest in protecting minor victims from further trauma because the effect of press coverage upon the minor victim will presumably vary on a case-by-case basis).

n210. Overbreadth is also a term of art to distinguish cases in which parties advance the interests of other persons not before the court from cases in which parties challenge a regulation as applied to them. See, e.g., R.A.V., 112 S. Ct. at 2542 n.3; Board of Trustees v. Fox, 492 U.S. 469, 482-83 (1989). We are not now speaking of rules of third-party standing. For purposes of the narrowly tailored prong of exacting First Amendment scrutiny, a statute is precisely



and accomplish substantially the same result. n213

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n213. The fact that the prong is more absolute does not mean that it requires perfection. Some minimum degree of overbreadth might be permissible. See Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 661 (1990) (upholding regulation as "not substantially overbroad" and drawing no distinction between overbreadth or "overinclusiveness" in facial and as-applied challenges).

-End Footnotes-

(c) "Necessary." - A separate and final question involves the requirement that a challenged regulation be "necessary" to achieve the state's compelling interest. As we have observed, the language appears in some statements of the test, but not in others. Indeed, the apparent randomness of its inclusion or exclusion suggests that the "necessary" requirement may be simply a byproduct or recharacterization of the two components of the narrowly tailored prong: a regulation must both (a) restrict no more speech than necessary and (b) burden speech no more heavily than necessary.

The current caselaw gives a mixed message regarding the extent to which a speech restriction must be "necessary" in order to survive exacting scrutiny. In Riley v. National Federation of the Blind, n214 for example, the Court held that the disclosure requirement imposed upon professional fundraisers failed exacting scrutiny because, inter alia, it was not narrowly tailored to advance the state's asserted interest in informing potential donors how the money they might contribute would be spent. The Court held that the State has "more benign" options like itself publishing detailed financial information about professional fundraisers or more vigorously enforcing its existing anti- [\*1534] fraud laws. n215 The crux of the Court's reasoning seemed to be that "government [may] not dictate the content of speech absent compelling necessity." n216

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n214. 487 U.S. 781 (1988).

n215. Id. at 800; see also Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 & n.11 (1980) (finding that broad prophylactic ban on canvassing not narrowly tailored because enforcement of existing laws against fraud would sufficiently serve purported governmental objective).

n216. Riley, 487 U.S. at 800.

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The Court's recent decision in Burson v. Freeman n217 presents a very different picture. Burson involved a challenge to a Tennessee statute that barred solicitation of votes and display of campaign materials within 100 feet of the entrance to polling places on election day. A plurality of the Court upheld the statute upon determining that the state's interest in preventing election fraud was compelling. Much of the plurality opinion considered whether campaign-free zones around polling places were necessary to achieve that objective:

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n217. 112 S. Ct. 1846 (1992).

-End Footnotes-

To survive strict scrutiny, however, a State must do more than assert a compelling state interest - it must demonstrate that its law is necessary to serve the asserted interest. While we readily acknowledge that a law rarely survives such scrutiny, an examination of the evolution of election reform, both in this country and abroad, demonstrates the necessity of restricted areas in or around polling places. n218

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n218. Id. at 1852. The Court then undertook a lengthy discussion of the evolution of the secret ballot, both in Australia and the United States. See id. at 1852-55.

-End Footnotes-

Although the plurality opinion in Burson suggests that "necessary" is an independent prong of exacting scrutiny, the standard employed seems highly malleable, and it is far from stringent. In fact, Tennessee had many options short of a solicitation ban available to it - increased police security or rules for crowd control would have made the restriction on speech unnecessary - but the plurality was unimpressed. n219 As Justice Stevens pointed out in his dissent, "the plurality declines to take a hard look at whether a state law is in fact 'necessary.'" n220 After Burson, it would appear that "necessary" is an [\*1535] independent prong of "exacting scrutiny," but of only questionable force.

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n219. The plurality concluded that, because "all 50 States, together with numerous other Western democracies" followed a tradition of using "a secret ballot secured in part by a restricted zone around voting compartments," this "wide-spread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interest in preventing voter intimidation and election fraud." Id. at 1855. This notion of "necessary" is far short of "essential."

Justice Scalia concurred on the ground that the law was a reasonable viewpoint-neutral regulation. Justice Thomas did not participate in the decision, and Justice Stevens, who was joined by Justice O'Connor and Justice Souter, dissented. The dissenters argued that, "under the plurality's analysis, a State need not demonstrate that contemporary demands compel its regulation of protected expression; it need only show that that regulation can be traced to a longstanding tradition." Id. at 1865.

n220. Id. at 1865 (Stevens, J., dissenting).

-End Footnotes-

With the foregoing understanding of the legal landscape as our guide, we are now prepared to submit the content-based proposals for the regulation of televised violence to exacting First Amendment scrutiny.

V. "Exacting Scrutiny" in the Light of Social Science Studies Showing a Relationship Between Televised Violence and Antisocial Aggression

In this Part we consider the principal types of content-based regulations: banning or zoning, balancing, and disclosure. For each type of provision, we examine whether it is necessary to achieve a compelling state interest and is precisely drawn in the least burdensome manner. We focus in particular on some of the notable social science data purporting to show a positive relationship between portrayals of violence on television and antisocial behavior. We do not address the regulations covering lock-out technology, because, as we have argued above, these regulations can be written to be content-neutral.

A. Banning/Zoning

1. Prong One: Does the Restriction Accomplish a Compelling Governmental Interest? - Congress would likely assert that a full or partial ban on televised violence will accomplish either of two discrete interests: (1) reducing societal violence; and (2) protecting the psychological and emotional well-being of minor viewers. n221 That both interests are compelling is indubitable. Few if any state interests are more important than protecting the lives and property of its citizens from antisocial violent behavior. Additionally, "it is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" n222 Consequently, whether the first prong of exacting scrutiny is satisfied reduces to whether banning or zoning televised violence would actually accomplish either of the state's asserted compelling interests. n223

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n221. Although commentators routinely note both types of alleged harm, few translate the two into distinct interests requiring different legal analyses.

According to a theory developed by George Gerbner at the University of Pennsylvania's Annenberg School for Communication, television violence harms society in a more insidious way than merely by stimulating discrete individual acts of aggression. Its more profound effect is to cultivate fear, anxiety, and an acceptance of power relations that breeds docility and resistance to change. See Krattenmaker & Powe, supra note 14, at 1157-70; see also Kim, supra note 3, at 1390-91 & nn.30-31. It is hard to tell whether this theory is intended to embrace more than the "psychological well-being" interest. Whatever the merits of this argument, it belongs more to the arena of philosophy and social theory than it does to legal analysis, at least until it can be framed in more concrete terms. Such an amorphous and unevaluable social danger probably cannot constitute a "compelling interest" within the meaning of First Amendment scrutiny. Cf. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 640-42 (1943) (holding that clear and present danger test requires concrete harm to individuals and that harm to "national unity" is too nebulous to justify restriction of speech).

n222. New York v. Ferber, 458 U.S. 747, 756-57 (1982) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

n223. Thus, the oft-stated objection that regulation of media violence is unconstitutionally paternalistic misses the mark. See, e.g., Robert S. Peck, The First Amendment and Television Violence 1-2 (Dec. 2, 1993) (draft memorandum for the ACLU) (on file with the authors); Krattenmaker & Powe, supra note 14, at 1157; Kim, supra note 3, at 1430 ("Do viewers prefer violence? The answer to this question is critical to the policy debate on this issue. If viewers want violence, then there really isn't much to debate - the public is getting what it wants.").

To be sure, the First Amendment forbids the government to prevent adults from receiving information on the grounds that the messages will be harmful to them. See, e.g., First National Bank of Boston v. Bellotti, 435 U.S. 765, 791 n.31 (1978) (citing cases). But such a flat constitutional ban does not apply when the government's justification is either to prevent harm to persons other than the willing listeners (i.e., to combat externalities) or to protect children in the audience.

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(a) Reducing societal violence: Review of the "Violence Hypothesis." - In considering the interest in reducing societal violence, it is clear that the underinclusiveness problem will be implicated. Even a complete ban on televised violence would not eliminate societal violence. The analysis therefore proceeds in three steps: (1) is televised violence a causal factor for societal violence? (i.e., would a ban on the former even partially serve the state's interest); (2) what is the magnitude of the causal effect? (i.e., how much societal violence could a given regulation of television violence eliminate); n224 and (3) would the state's interest in such a partial reduction of societal violence be a compelling interest?

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n224. In sum, the question is whether, and to what extent, televised violence contributes to antisocial violent behavior. That is, absent televised violence (or, more precisely, absent the particular programming that a specific regulation might eliminate) how many violent acts would be prevented?

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This first question embraces the "violence" or "causal" hypothesis - "viewing televised violence causes subsequent aggression against individuals or property" n225 - and has generated an extensive body of social scientific research and debate. This subsection summarizes and analyzes that literature. We first present a descriptive overview of the data that underlie the prevailing consensus of opinion in the social scientific community in favor of the violence hypothesis. Next, we discuss the chief criticisms of the majority view. Finally, we assess these objections critically. The sheer mass of the literature - literally hundreds of studies, commentaries, and narrative reviews published over the past three decades - ensures that the following exploration be cursory. n226 Additionally, because some of the debate centers on methodological disputes, it bears mention that neither of the authors is trained in social psychology or the quantitative social sciences generally.

Nonetheless, we are confident that the ensuing discussion will provide sufficient basis for constitutional analysis.

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n225. Krattenmaker & Powe, supra note 14, at 1135.

n226. See George Comstock, The Evolution of American Television 159-238 (1989), for a thoughtful and accessible treatment of some of the important literature.

-End Footnotes-

Investigators have employed three types of research to test the violence hypothesis: laboratory experiments, field studies, and correlational surveys. In simplified form, researchers in a laboratory experiment segregate subjects into experimental and control groups and expose the former to televised violence and the latter to nonviolent programming or to no programming at all. The groups are then provided an opportunity to aggress. Studies typically show that subjects exposed to violent programming are more aggressive than subjects in the control group.

Two early studies provide the models from which much subsequent work has developed. In a famous series of experiments dating from the early 1960s, Albert Bandura and his colleagues compared the effects of live and filmed depictions of violent behavior on subsequent aggressive behavior by nursery school children. n227 The children were divided into five groups. The first group was exposed to a live model who verbally and physically abused a Bobo doll, a large inflated plastic figure of a clown. The second group witnessed a film of the same model engaging in the same conduct. The third group viewed the same violent activity, but this time the aggressor was a woman dressed as a cat to evoke television cartoons. The fourth and fifth groups were controls: one viewed a film of the model playing calmly with the Bobo doll; the other was not exposed to the woman or the doll.

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n227. These experiments are summarized in Albert Bandura, Aggression: A Social Learning Analysis 72-76 (1973).

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After the exposure, the children were mildly frustrated by being led past a full and inviting playroom and then escorted individually to a second room more sparsely furnished with a Bobo doll, a mallet, dart guns, and a few other toys. Experimenters observed the children through a one-way mirror and counted the number of times each child committed an aggressive action such as kicking or shooting the doll. The researchers discovered that, on average, the children in the three experimental groups committed nearly twice as many aggressive acts as did the children in the two controls. Similar results have been obtained with human models instead of Bobo dolls. n228

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n228. See the discussion in Krattenmaker & Powe, supra note 14, at 1138-39.

-End Footnotes-

In a second experimental paradigm, pioneered by Leonard Berkowitz, investigators measured the effect of violent programming [\*1538] on viewers' willingness to administer electric shocks to other individuals. n229 The experiments have been conducted across a range of age groups, with a variety of violent materials, and with or without the subjects being provoked to anger or frustration. The results routinely reveal that those who view the violent programs will deliver longer and more intense shocks.

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n229. Examples of such experiments are discussed id. at 1139-42. As in Stanley Milgram's famous experiments about the banality of evil, the subject is told that the press of a button or turn of a dial will deliver an electric shock to another person who is connected to the machine. In fact, the latter individual, an associate of the experimenter, does not actually experience pain or discomfort.

-End Footnotes-

These and similar experiments have provided strong support for the violence hypothesis. There is near-universal agreement among social scientists that, in the laboratory setting, televised violence is a causal factor for aggressive behavior. n230 It is similarly acknowledged, however, that the generalizability of laboratory studies of behavior is necessarily limited. A necessary cost of the greater control the experimenter can achieve in the laboratory is the artificiality of the situation. n231

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n230. As the principal skeptic in the social scientific community has conceded, "it seems clear that ... viewing violent material on television or film in the laboratory can increase aggressive responses in the laboratory." Jonathan L. Freedman, Effect of Television Violence on Aggressiveness, 96 Psychol. Bull. 227, 228 (1984).

n231. See, e.g., id.

-End Footnotes-

Although a well-designed experiment will minimize the artificiality of conditions, the "external validity" of the research, that is, the degree to which conclusions drawn from laboratory studies hold true in the "real world," is always subject to some doubt. The force of this doubt varies from case to case, depending upon the extent and manner in which the laboratory conditions depart from conditions obtaining in natural settings. As we will see, adherents and critics of the violence hypothesis differ mightily regarding the external validity of laboratory experiments. Before assessing the merits of this debate, however, we turn to efforts to garner direct information about the effect of televised violence in natural settings - field experiments and correlational surveys.

In field as in laboratory experiments, subjects are randomly assigned to groups, exposed to various types of television or film programming, and then measured for aggressive behavior. Field experiments differ from their laboratory counterparts principally in two facets. The settings are relatively natural, and the experimenters measure actual aggressive behavior engaged in over a longer period of time.

In one of the best-known studies, conducted by Seymour Feshbach and Robert Singer and published over twenty years ago, several hundred adolescent boys living in residential schools and [\*1539] group homes were assigned to either a violent or nonviolent television diet. n232 Over the course of six weeks, adults in the homes and schools monitored the aggressive behavior of all the boys. The results were ambiguous; indeed, in some homes the boys who watched the nonviolent fare aggressed more than did those who watched the violent programs.

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n232. This experiment is well summarized in Spitzer, supra note 53, at 105-06. Boys in the former group watched such programs as Bonanza and The Rifleman. Programs for the latter group included Andy Williams and Gomer Pyle. Id.

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Unfortunately, these results reveal little, for most commentators have concluded that the experiment was badly flawed in design and execution. The most substantial failing arose from the fact that the boys who were assigned the nonviolent programming protested over being deprived programs that were in their usual television diet. Consequently, the boys in the nonviolent television group did not function as a control - they were considerably more frustrated and angry than their peers who were permitted to watch violent television. In fact, the boys who were supposed to watch only nonviolent shows objected so strenuously that the researchers capitulated and let them watch Batman. So the nonviolent diet was no longer entirely nonviolent. n233

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n233. There were further reasons to discredit the study. For example, the boys may have outfoxed the researchers. Having guessed the purpose of the experiment, boys assigned the aggressive diet may have tried to curb their aggression (and boys in the other group may have acted up) to convince the adults that violent programming did not induce aggression and thereby to preserve their preferred television fare. Id.

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While there have been other field experiments, some supporting the violence hypothesis, some contradicting it, most too have suffered from methodological failings. n234 Believers and skeptics of the violence hypothesis generally agree that the field experiments are too inconsistent and methodologically faulty to provide any information regarding causation: they neither disprove nor bolster the violence hypothesis. n235 We need not discuss them further.

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n234. See Comstock, supra note 226, at 232-33; L. Rowell Huesmann et al., The Effects of Television Violence on Aggression: A Reply to a Skeptic, in Psychology and Social Policy 191, 193-96 (Peter Suedfeld & Philip E. Tetlock eds., 1992).

n235. See, e.g., Comstock, supra note 226, at 232 ("It is widely acknowledged that the several field experiments which have been conducted are uninterpretable as a body of evidence."); Freedman, supra note 230, at 234.

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A second type of field study, and the third of the major investigative designs, is the correlational survey. In the simple survey, a researcher gathers information via interviews and printed questionnaires regarding the viewing habits and aggressiveness of a large number of subjects. The researcher then analyzes the data to determine the degree to which television viewing correlates with aggressive behavior. A detailed discussion of the data is not necessary. Scores of studies, involving thousands of subjects of both sexes ranging in age [\*1540] from young children to high school and college students in several countries, have clearly established, at the least, "that children and adolescents who watch more violent programs on television or who prefer violent programs tend to be more aggressive." n236

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n236. Freedman, supra note 230, at 236-37.

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It is an essential truth of statistics, however, that correlation does not prove causation. That viewing television violence is positively correlated with aggressive behavior can be explained in three ways: (1) viewing television violence causes aggressive behavior; (2) a disposition to behave aggressively causes a preference for violent television programming; or (3) an independent factor, or set of factors, causes both violent behavior and a preference for violent programming. n237 Several investigators have attempted to discern which hypothesis is true.

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n237. See, e.g., id. at 237.

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In one of the most important of the surveys, William Belson gathered detailed information about behavior and viewing habits of over 1500 adolescent males in London. n238 Among his elaborate set of findings, Belson discovered a moderate correlation between high exposure to television violence and violent behavior in general. n239 Most importantly for the causal question, however, was his analysis of the relationship between television violence and serious violent behavior:

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n238. William A. Belson, Television Violence and the Adolescent Boy (1978). The study was financed by CBS.

n239. Id. at 520-21.

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(i) heavier viewers of television violence commit a great deal more serious violence than do lighter viewers of television violence who have been closely equated to the heavier viewers in terms of a wide array of empirically derived matching variables; (ii) the reversed form of this hypothesis is not supported by the evidence. n240

By undermining both causal alternatives to the violence hypothesis (that independent factors cause aggressive behavior as well as a preference for television violence, and that an aggressive disposition causes a preference for television violence), this important finding went far beyond a demonstration of mere correlation. It tended, Belson claimed, to establish the violence hypothesis.

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n240. Id. at 15.

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The other meaningful way to derive causation from correlational data is by means of a longitudinal correlation study. In a longitudinal study, data collectors simply return to their subjects after a significant passage of time to gather the same information. In one such study, n241 researchers surveyed over 800 third graders and returned ten years later to survey over half of the original participants. They found that viewing television violence correlated positively with aggressive behavior at both points in time and that the correlations between viewing television violence in third grade and various measures of aggression ten years later were also statistically significant. The correlation between aggressive behavior in third grade and viewership of television violence ten years later, however, was, at most, at the borderline of statistical significance. Although such findings do not prove the violence hypothesis, they strongly bolster it relative to the reverse causal hypothesis.

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n241. Monroe M. Lefkowitz et al., Growing Up to Be Violent: A Longitudinal Study of the Development of Aggression (1977).

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Although the foregoing discussion is highly abbreviated and simplified, it presents the skeleton of the empirical social scientific case for the violence hypothesis. Laboratory experiments demonstrate that television violence causes aggressive behavior in controlled settings. Correlational surveys reveal at least that the viewing of televised violence in real life correlates with

aggressive behavior, and suggest - but do not establish - causation as well. Partly on the basis of such research findings, the National Institute of Mental Health could report in 1982 that

the consensus among most of the research community is that violence on television does lead to aggressive behavior by children and teenagers who watch the programs... Not all children become aggressive, of course, but the correlations between violence and aggression are positive. In magnitude, television violence is as strongly correlated with aggressive behavior as any other behavioral variable that has been measured. n242

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n242. Television & Behavior, supra note 7, at 6.

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Despite this growing consensus, skeptics remain, both in the social scientific and legal communities. (Indeed, legal analyses have been, if anything, the more critical of the empirical evidence. n243) The dissenters' objections fall into two distinct categories: they challenge the evidence as both unpersuasive and irrelevant. n244

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n243. In the most thorough examination of televised violence in the legal literature to date, Krattenmaker and Powe concluded: "Upon analyzing the methodologies and definitions employed by the researchers, a reasonable person must conclude that no acceptable evidence supports the violence hypothesis." Krattenmaker & Powe, supra note 14, at 1169-70; see also id. at 1170 (Given "the available evidence concerning the impact of televised violence ... [no] foreseeable regulatory program designed to inhibit or channel violent programming ... could be supported by any acceptable view of rational policy formulation."). In a more recent appraisal, the same authors are still critical of the data but less strident. See Krattenmaker & Powe, supra note 145, at 126-32; see also Spitzer, supra note 53, at 116.

n244. Some critics have also questioned the reliability of the published data, alleging that biases and predispositions of journal editors have skewed the published findings in favor of studies that report positive results. See Spitzer, supra note 53, at 116; Jonathan L. Freedman, Television Violence and Aggression: What Psychologists Should Tell the Public, in Psychology and Social Policy 179, 185 (Peter Suedfeld & Philip E. Tetlock eds., 1992); Krattenmaker & Powe, supra note 14, at 1154-55.

While some publication demand effect might exist, it is impossible to determine how to factor such a datum into an overall assessment of the validity of the violence hypothesis. Indeed, the critics do not attempt to quantify this objection and are willing to rely upon speculation and anecdotal evidence. One meta-analytical report discerned no statistically significant difference between the results achieved in published and unpublished studies. Wendy Wood et al.,

Effects of Media Violence on Viewers' Aggression in Unconstrained Social Interaction, 109 Psychol. Bull. 371, 373-80 (1991).

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[\*1542]

The critics object, first, that a fair interpretation of the data simply does not support the violence hypothesis. In reaching this conclusion, they identify methodological failings in individual studies and emphasize the lack of uniform results and sometimes weak statistical correlations. n245 Ultimately, however, the bulk of the skeptical objection to the weight and sufficiency of the evidence rests upon the reservations already noted about the explanatory reach of each of the important research techniques. Because the field experiments are, as a body, so uninformative, the violence hypothesis must rest on the lab experiments and the correlational surveys. Accordingly, the critics especially stress the obstacles to the external validity of the laboratory experiments and the inability of the correlational surveys to prove causation.

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n245. See, e.g., Freedman, supra note 244, at 184-87.

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Dissenters have identified four factors as posing the most formidable challenges to the external validity of the laboratory experiments. n246 They object, first, that the viewing experience is unnatural. The programming to which the subjects are exposed - which is either made specially for the experiment or culled from actual television shows - does not fairly reflect the mixture of violent and nonviolent programs in a natural television diet. Also, normal television viewing tends to be characterized by less concentrated attention to the screen than occurs in the laboratory. Second, critics point to the frequent practice of provoking or frustrating subjects before or after exposure in order to increase the magnitude of effects. Third, critics claim that viewers in natural settings rarely have the opportunity for immediate aggression that the laboratory experiments provide. Fourth and, in the estimation of most critics, most fatally, lab aggression is not subject to the formal and informal sanctions that apply in the real world to discourage antisocial aggression. To the contrary, the critics continue, experimenter demand effects are likely actually to encourage the aggressive behavior that the experimenter hopes to measure.

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n246. See generally id.; Spitzer, supra note 53, ch. 6; Freedman, supra note 230; Krattenmaker & Powe, supra note 14, at 1147-57.

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Where the skeptical case against the laboratory experiments is essentially qualitative, the critics' reservations about the correlational surveys is quantitative and highly technical. While conceding correlation, n247 the critics offer a host of reasons to doubt that even Belson's study and the longitudinal surveys permit confident inferences about [\*1543] causation. We will explore neither these criticisms n248 nor the responses they have provoked. Because

the debate now centers on such issues as the proper mathematical technique for interpreting longitudinal survey data, n249 we will not rely in our analysis on the degree to which the correlational survey data alone support the causal hypothesis.

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n247. See supra note 236 and accompanying text.

n248. For the skeptical position on the correlational survey data, see Freedman, supra note 230, at 237-43. For a more recent, though less elaborate statement, see Freedman, supra note 244, at 181-83.

n249. The import of Huesmann et al.'s response to Freedman on the question of correlational surveys is that cross-lagged correlational analysis (which is the method described for illustrative purposes supra text accompanying note 241) is less reliable than regression analysis. See Huesmann et al., supra note 234, at 197.

-End Footnotes-

Finally, dissenters object that even if the violence hypothesis is accepted as proven, it is irrelevant to political and constitutional debate because "no one yet has been able to suggest an acceptable operational definition of the very kind of behavior sought to be measured: 'violence.'" n250 The problem, as the critics see it, is that researchers have tested for whether televised violence causes aggressive behavior, but that aggression codes for a vast range of behaviors, from the normatively neutral to the highly valued and generously rewarded. n251 Laboratory experiments that measure aggression against a Bobo doll and correlational studies that include verbal aggression within a single measure of aggressive behavior tell us nothing about the effect of televised violence on behavior with which the law is, or should be, concerned. As Krattenmaker and Powe put it, First Amendment scrutiny requires evidence demonstrating that televised violence produces "the purposeful, illegal infliction of pain for personal gain or gratification that is intended to harm the victim and is accomplished in spite of societal sanctions against it." n252

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n250. Krattenmaker & Powe, supra note 14, at 1155.

n251. Id.; Spitzer, supra note 53, at 114.

n252. Krattenmaker & Powe, supra note 14, at 1156; see also Spitzer, supra note 53, at 114 (quoting definition approvingly).

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How persuasive are these several objections? The first and more fundamental of the skeptical criticisms - that the published data do not adequately support the violence hypothesis - has been aggressively debated in the social science literature. Although a full exploration of this debate - or, put otherwise, an independent assessment of the validity and significance of the data - is far beyond the scope of this Article, the central points in the majority's rebuttal can be summarized.

First, many researchers have argued that the skeptics overstate the obstacles to the external validity of the laboratory experiments. Consider, for example, Krattenmaker and Powe's objection that "aggressive behavior did not occur, or occurred less frequently, [\*1544] when the subjects were not frustrated or angered before testing. Given these findings, these test results suggest at most that people angered or frustrated by other experiences in life may be stimulated by televised violence to perform violent acts." n253 Surely the majority might emphasize that researchers have obtained statistically significant positive results even without frustrating their subjects. But the crux of the majority response must be that this skeptical criticism, taken for all it's worth, is no impediment to external validity. The fact that viewers who have experienced anger or frustration will be more susceptible to the influence of television violence might speak to the magnitude of the causal hypothesis in real life. However, given that the television audience does include a fair number of persons who suffer frustration or anger comparable to that induced in laboratory subjects, this point does not speak to the naturalizability of laboratory findings. n254

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n253. Krattenmaker & Powe, supra note 14, at 1152 (citation omitted).

n254. See Comstock, supra note 226, at 237.

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Proponents of the violence hypothesis also have rebutted the assertion that external validity is threatened by lack of sanctions in the lab and alleged experimenter demand effects. Huesmann et al. have argued that the skeptics' positing of demand effects "runs counter to the empirical evidence" and propose that it is more likely that subjects who discern the experimenter's intent will try to suppress aggressive response. n255 Even more significantly, many researchers have disputed that laboratory experiments with young children differ in any meaningful way from what is a "natural" setting: "Children at [nursery school] age lack the concept of experimentation that would lead them to behave atypically, and the experience of watching television and then playing (when behavior is measured) while under adult supervision is hardly unusual for them." n256 Taken together, these two arguments suggest that older subjects might respond against possible demand effects, while young children will not experience any difference in external pressure ("sanctions") against aggressive behavior in or out of the laboratory setting.

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n255. Huesmann et al., supra note 234, at 192-93.

n256. Comstock, supra note 226, at 228; see also Wood et al., supra note 244, at 374.

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Second, as briefly noted, scientists in the majority camp believe that the correlational surveys reveal more about causation than do the skeptics.

Finally, and most profoundly, the majority insists that the whole thrust or focus of the skeptical attack is misguided. Of course, they concede, laboratory experiments cannot prove their own external validity. And of course correlational surveys can never disprove all factors that might be independent causes of both viewership of television [\*1545] violence and aggressive behavior. n257 But when it comes to evaluating the full body of research on the violence hypothesis, the whole is considerably greater than the sum of its parts. "What is most impressive about the media violence research is the way in which the laboratory experiments, correlational single-wave field studies, and longitudinal developmental studies all complement each other in linking exposure to media violence with subsequent aggression." n258 This point is confirmed by several projects that have applied meta-analysis - a recently developed technique to arithmetically average the results of studies with nonuniform characteristics n259 - to laboratory, field, and survey data. All have yielded strong support for the causal hypothesis. n260

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n257. See, e.g., Comstock, supra note 226, at 234-35. We might add that, given Occam's Razor, this fact should provoke little concern.

n258. Huesmann et al., supra note 234, at 192; see also Comstock, supra note 226, at 228 (emphasizing that "the many experiments are, on the whole, so consistent in outcome, so complementary and plausible in leading to explanations for the effects of television violence on aggressive and antisocial behavior, and so logically linked to and consistent with the outcome of research on other kinds of media effects and on topics other than media effects").

n259. "Meta-analyses are statistical procedures to represent the outcomes of individual studies in a standardized metric. These outcomes can then be aggregated to yield an estimate of effect across a body of literature." Wood et al., supra note 244, at 372.

n260. See, e.g., id. (aggregating 23 experimental studies that investigated aggression by children and adolescents in unconstrained social interaction and finding significant support for the causal hypothesis); F. Scott Andison, TV Violence and Viewer Aggression: A Cumulation of Study Results 1956-1976, 41 Pub. Opinion Q. 314 (1977); Susan Hearold, A Synthesis of 1043 Effects of Television on Social Behavior, in 1 George Comstock, Public Communication and Behavior 65 (1986).

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It is ultimately significant, we believe, that critics have advanced substantially the same criticisms for well over a decade, yet there remains a strong consensus among social psychologists who have examined the question that television violence does cause aggressive behavior. n261 A reading of the legal literature is skewed toward skepticism (perhaps in part because analysts have imported into the causal debate legitimate reasons to believe that regulation of television violence would be unconstitutional for other reasons) and therefore tends to overstate the objections against the violence hypothesis and to overlook the responses to those objections. We believe that the evidence is persuasive - not conclusive, to be sure - and do not dissent from the prevailing social scientific view. However, a fact highly significant to social psychology - that television violence causes viewers to behave aggressively - might bear

little relevance to law and politics, for the state recognizes good, bad, and neutral forms of aggression. This is the second skeptical objection to the violence hypothesis.

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n261. Comstock, supra note 226, at 198-99; Huesmann et al., supra note 234, at 191.

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Krattenmaker and Powe have written that the lack of an adequate operational definition of violence is the "most damaging" objection to the violence hypothesis. n262 We believe, however, that an important misunderstanding underlies Krattenmaker and Powe's deep reliance on their definitional or "irrelevance" objection to the violence hypothesis. This confusion is manifested by the argument that immediately follows their proposed definition of violence: "Whether viewing such behavior simulated on television tends to cause its occurrence in real life seems to be the question about which researchers, regulators, and the public care." n263 Not quite. The real social and legislative concern is that some identifiable subset of television fare causes antisocial behavior of a sort that the state has a compelling interest in eliminating or reducing. In point of fact, most people who share this concern believe that the identifiable subset itself can somehow be defined by reference to its "violent" content. But that need not be the case. If, for example, research attributed societal violence to the telecast of poignant dramas about a young boy and his dog, that would be a conceivable basis for Congress to ban Lassie.

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n262. Krattenmaker & Powe, supra note 14, at 1155.

n263. Id. at 1156; see also Krattenmaker & Powe, supra note 145, at 132.

-End Footnotes-

If the simple point is that the legislature need not cabin its efforts to reduce televised violence to depictions of the very behavior the real-world reduction of which constitutes the state's compelling interest, n264 the upshot is that the irrelevance objection does not cut as broadly as might at first appear. The fact that researchers have neither uniformly tested the same material nor articulated a narrowly precise definition of the putatively harmful programming does not present a serious challenge to the violence hypothesis. The definitional objection reduces to the single claim that, even if the research evidence establishes that televised violence does cause aggression in natural settings, it does not demonstrate that televised violence causes antisocial aggression. This is certainly not a trivial objection. But it is far from fatal.

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n264. For example, many commentators have opined that the telecast of sporting events causes as much violent behavior by its viewers as does any other type of television programming. See, e.g., O'Connor, supra note 49, at II.1 (noting the high incidence of spousal and partner abuse immediately following

the Superbowl); Anna Quindlen, Time to Tackle This, N.Y. Times, Jan. 17, 1993, at A17 (noting that Super Bowl Sunday may be one of the busiest days of the year at shelters for battered women).

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The objection invites two responses. It is true, of course, that a causal relationship between televised violence and antisocial violence cannot be logically deduced from data which show only that televised violence causes aggression, broadly defined. But because antisocial aggression is a subset of the aggression that the social science data have primarily recorded, it is reasonable to infer that televised violence will cause some degree of the behavior that Congress can rightly attempt to curb. Moreover, it is false that the research has concerned [\*1547] itself only with minor aggressions. While laboratory experiments, of course, have not sought to measure "seriously" aggressive or criminal behavior, several correlational surveys, including Belson's well-regarded London study, did. Researchers have concluded that high exposure to television violence increases the incidence of seriously violent behavior, including the commission of crimes against persons and property. n265

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n265. Belson, supra note 238. For a brief summary of Belson's conclusions, see Comstock, supra note 226, at 233-35. See also Brandon S. Centerwall, Reviews and Commentary: Exposure to Television As a Risk Factor for Violence, 129 Am. J. Epidemiology 643, 643-44 (1989) (discussing other studies correlating television violence and criminal behavior). It is thus not the case, as Krattenmaker and Powe have contended, that empirical investigators have not even attempted to measure the effect of television violence on antisocial aggressive behavior. See Krattenmaker & Powe, supra note 145, at 132; Krattenmaker & Powe, supra note 14, at 1156-57.

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The evidence, in sum, supports both the weak version of the violence hypothesis and the stronger claim that viewing television violence is a causal factor for antisocial and criminal aggression. The evidence is not, we reiterate, conclusive. But, especially from the perspective of a court reviewing a regulation of television violence that is itself premised on the legislature's conclusion that television violence causes serious antisocial behavior, it need not be.

To be sure, a court must not simply accept at face value the legislature's claim that a challenged regulation will advance the state's asserted interest. "Mere speculation of harm does not constitute a compelling state interest." n266 Furthermore, the Court has stated squarely that "deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." n267 Yet, in its recent decision in Turner Broadcasting System v. FCC, n268 the Court stressed that considerable deference is due legislative findings regarding complicated predictive questions:

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n266. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 543 (1980). Even when regulating commercial speech, the state "must demonstrate

that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993). A fortiori, the State must make at least as strong a showing when regulating high-value speech.

n267. *Sable Communications v. FCC*, 492 U.S. 115, 129 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

n268. 114 S. Ct. 2445 (1994).

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Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable....

That Congress' predictive judgments are entitled to substantial deference does not mean, however, that they are insulated from meaningful judicial review altogether.... This obligation to exercise independent judgment when First Amendment rights are implicated is not a license to [\*1548] reweigh the evidence de novo, or to replace Congress' factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence. n269

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n269. *Id.* at 2471. The Court then denied summary judgment for the government, holding that the record did not adequately establish that must-carry legislation was necessary to preserve the viability of local broadcasting. See also *id.* at 2472 (Blackmun, J., concurring) (emphasizing both "the paramount importance of according substantial deference to the predictive judgments of Congress," and the high standard for summary judgment); *id.* at 2473 n.1 (Stevens, J., concurring) (agreeing with the test set out by the majority but indicating his judgment that the standard was satisfied).

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In particular, a court's decision whether to defer to a congressional predictive judgment will likely be colored by two factors. First, as TBS indicates, the court should make sure not to impose an unreasonable evidentiary burden upon Congress with respect to the assessment of empirical data. n270 Second, the court should extend deference to reasonable congressional judgments that are intuitive and commonsensical when such judgments do not admit of exact proof. n271 Because the violence hypothesis is surely both intuitive n272 and impossible to [\*1549] prove, n273 a reviewing court should afford due deference to congressional findings that conclude that television violence does cause aggressive behavior. Even the most steadfast skeptic in the social scientific community has acknowledged that an objective scientist could reasonably approve the violence hypothesis on the basis of all available data. n274 Consequently, a reviewing court faced with the issue would likely conclude that certain regulations properly may be premised on the data indicating that

televised violence causes antisocial aggression.

-Footnotes-

n270. See also *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973):

The judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claim under the umbrella of the First Amendment. That is not to say we "defer" to the judgment of the Congress ... on a constitutional question .... The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem.

Id. at 103.

n271. For example, in *Globe Newspaper Co. v. Superior Court*, the Court refused to accept the State's effort to justify its ban on public and press from certain sex offense trials by reference to its interest in encouraging minor victims to testify:

The Commonwealth has offered no empirical support for the claim that the rule of automatic closure ... will lead to an increase in the number of minor sex victims coming forward and cooperating with state authorities. Not only is the claim speculative in empirical terms, but it is also open to serious question as a matter of logic and common sense.

457 U.S. 596, 609-10 (1982). See also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789-90 (1978) (remarking that the state's arguments for how the challenged statute would advance its purported interest are neither "supported by record or legislative findings" nor "inherently persuasive").

n272. It seems next to impossible to demonstrate that a given claim is intuitively sound to one who is not already convinced. Perhaps this is one question on which opinion polls constitute persuasive evidence. See *supra* note 1 and accompanying text.

To undermine the intuitive appeal of the violence hypothesis, one would need not merely to question the social science data, but also to suggest a plausible causal theory for why televised violence would not contribute to societal violence. One theory has proposed that televised violence provides a cathartic effect upon viewers, thereby giving them an opportunity for vicarious release of their violent urges. According to the catharsis hypothesis, then, televised violence might actually reduce social violence. Whatever the theory's abstract plausibility or its validity when applied to other phenomena, most social scientists agree that it does not describe the effect of television violence. See *infra* note 312.

n273. See, e.g., Huesmann et al., *supra* note 234, at 198 (claiming that "definitive proof" of a causal effect "is a logically unreachable conclusion, according to Popper's ... falsificationist analysis"); Comstock, *supra* note 226, at 9. Comstock notes:

It would be foolish to pretend that "research," given the resources that have been devoted to any particular question, will consistently reply with compelling, definitive answers, or that there are not some questions that are difficult or impossible to confront directly in any sound way by available methods and techniques. We should not be afraid that empirical evidence will mislead us as much as we should be careful that we do not discard what it can tell us by subjecting it to unrealistic or inconsistent standards.

Id. (emphasis added).

n274. See Freedman, supra note 244, at 179 ("Some of those who read the available research carefully may conclude that the effect probably exists, others will find that they are unable to make a reasonable guess, and still others will be led to think that watching TV violence probably does not affect aggression."). Contrast this measured skepticism with Krattenmaker and Powe's conclusions in their 1978 article. See supra note 243.

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Causation, though, is not enough. To accept the causal hypothesis is only to conclude that regulation of television violence would serve the state's compelling interest in combatting societal violence. To determine whether the interest the legislation accomplishes is compelling, we need to know how much societal violence the regulation would curb. n275 Thus, for purposes of the compelling interest prong of exacting scrutiny, the issue most likely will not be whether television violence causes societal violence, but how much. Unfortunately, despite the vast number of studies investigating the violence hypothesis, there is scant data on the magnitude of the effect of television violence.

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n275. It would not do, of course, for advocates of television violence regulation to define the government's objective as the elimination of social violence caused by viewing television violence. By ensuring a closer fit between ends and means, such a move would permit the conclusion that the regulation not merely "serves," but accomplishes, the state's interest. Cf. Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 120 (1991) ("The Board has taken the effect of the statute and posited that effect as the state's interest. If accepted, this sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored."). Still, whether the state's reformulated interest is "compelling" depends on the amount of societal violence that television violence causes.

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The most prominent report to address this issue was a recent epidemiological study conducted by Brandon Centerwall. n276 The epidemiological methodology is straightforward: in this case it was to compare the incidences of violent behavior in two comparable popula- [\*1550] tions - one exposed to television violence, the other not exposed. Such a comparison is impossible in the United States, however, given the pervasiveness of television in general and violent programming in particular. Centerwall took advantage of a historical accident - that television was banned in South Africa until 1975 - to undertake a cross-national epidemiological study of the United States, Canada, and South

Africa.

-Footnotes-

n276. Centerwall, supra note 265.

-End Footnotes-

Television was introduced in both the United States and Canada in the early 1950s. Centerwall found that the white homicide rate n277 in the United States, and the overall homicide rate in Canada, increased by over ninety percent from 1945-1974. n278 Meanwhile, in South Africa, the white homicide rate decreased slightly. Following the introduction of television in 1975, the South African homicide rate increased over fifty percent by 1983. The measured homicide rates in the United States and Canada over those eight years remained stable. On the basis of this study, Centerwall determined that television was etiologically related to nearly half of all homicides and inferred a similar causal relation between television and other forms of interpersonal violence. n279 He concluded "that if, hypothetically, television technology had never been developed, there would today be 10[, ]000 fewer homicides each year in the United States, 70[, ]000 fewer rapes, and 700[, ]000 fewer injurious assaults." n280

-Footnotes-

n277. Centerwall looked at only white homicide rates in the United States and South Africa because of the greater difference in living conditions of blacks in the two countries. In Canada, which was 97% white when television was introduced, Centerwall examined overall homicide data. Id. at 645.

n278. There was a delay of 10-15 years in both countries before the homicide rate began steadily to climb - a lag that would coincide with the maturation to criminal age of the first generation of children raised with television. Id.

n279. Id. at 651.

n280. Brandon S. Centerwall, Special Communication - Television and Violence: The Scale of the Problem and Where to Go From Here, 267 JAMA 3059, 3061 (1992).

-End Footnotes-

Given the inherent limitations of cross-national epidemiological data, that conclusion must strike anyone as the roughest of estimates. But even if accurate, it still tells us precious little about the probable effect of a ban on television violence. As Krattermaker and Powe note (seemingly against interest), some television programming might have beneficial effects that reduce societal violence. n281 Accordingly, a more limited content-based television regulation might yield an even more profound reduction of societal violence. On the other hand, several researchers have suggested that the mere act of viewing television contributes to societal violence, even if the content of the program [\*1551] watched is neutral. n282 If true, a ban on televised violence would have less of an impact than Centerwell's numbers suggest.

-Footnotes-

n281. Krattenmaker & Powe, supra note 145, at 125 n.115 ("Neither [Centerwall], nor we, have any idea whether the supposed good things television shows might balance out the supposed bad things television shows.").

n282. See, e.g., Freedman, supra note 230, at 236; Freedman, supra note 244, at 180; Schlegel, supra note 62, at 200 & nn.70-71.

There are two distinct reasons for this hypothesis. One view, emphasizing opportunity costs, speculates that the likely alternatives to watching television tend, in the aggregate, to teach prosocial behavior. The second view is grounded in the notion that all programming that arouses the viewer causes aggressive behavior. On the arousal hypothesis, see infra note 308 and accompanying text.

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But there is probably little need to parse the numbers too finely. As one government research administrator has noted, "if only one out of a thousand viewers were affected, a given prime-time national program with an audience of 15 million would generate a group of 15,000 viewers who had been influenced." n283 Because there is so much violence in our society, a relatively small proportional reduction might nonetheless constitute a compelling interest. It is hard to conceive that a court might defer to legislative findings that accepted the violence hypothesis, yet nonetheless conclude that the magnitude of the causal effect is too small to make the state's interest "compelling." n284

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n283. Pearl, supra note 2, at 231, 239-40; see also Wood et al., supra note 244, at 378 ("Exposure to media violence may have a small to moderate impact on a single behavior, but cumulated across multiple exposures and multiple social interactions the impact may be substantial.").

n284. The result would surely be otherwise were Congress to impose any form of violence regulation only upon broadcasters, thereby widening the already considerable gap between broadcast and cable fare. Although we cannot conceive that such a rule would pass exacting scrutiny, it is also true that under existing law it would not need to. Presently, content-based regulations of broadcast speech must be narrowly tailored to further a substantial government interest. See, e.g., FCC v. League of Women Voters of Cal., 468 U.S. 364, 380 (1983). However, the positive effect of a broadcast-only regulation would be so minimal (indeed, to the extent it spurs increased viewership of cable's more violent programming, it would be counter-productive), that we doubt it would serve even a "substantial" government interest.

The foregoing reason why a broadcast-only regulation would be unconstitutional should be distinguished from a possible equal protection violation. A conclusion that gross underinclusiveness prevents the regulation from accomplishing a compelling (or substantial) interest does not depend, as would an equal protection challenge, upon a determination that broadcast and cable television are similarly situated. See Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 666-68 (1990), for a helpful discussion of the use of underinclusiveness in an equal protection challenge to a content-based speech restriction.

-End Footnotes-

(b) Protecting children from harm. - Before reaching the second prong of the inquiry, a brief discussion is warranted regarding whether a full or partial ban on television violence would accomplish the state's admittedly compelling interest in protecting the emotional and psychological well-being of children viewers. Although the First Amendment permits the state to restrict speech in order to protect children from harm, children do retain significant expressive rights. The state must demonstrate that the speech it would restrict in the [\*1552] interest of minors' well-being is in fact harmful to them. n285 Unfortunately, there is little data on whether television violence harms children, for the great bulk of academic commentary and social science research regarding television violence has focused on the violence hypothesis. But, although observers have often appeared to assume that the questions whether television violence causes antisocial behavior and whether it threatens the health of its viewers amount to the same thing, n286 the two harms are distinct.

-Footnotes-

n285. See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-14 (1975) (refusing to uphold ordinance that prohibited drive-in movie theaters whose screens are visible from a public space from showing films containing nudity on grounds of protecting children from harm).

n286. See, e.g., *Albert*, supra note 16, at 1302-03:

In recent years, medical authorities and social scientists increasingly have criticized television for being excessively violent. Their concern grows out of a belief that televised violence presents a special threat to the health of younger viewers. Critics of violent programming and defenders of the television industry have engaged in an intense, emotion-charged debate over whether viewing televised violence actually causes aggressive behavior.

-End Footnotes-

On one hand, television violence might harm viewers in a way that does not manifest in violent and antisocial behavior. On the other, we cannot, as a categorical matter, infer pathology from mere antisocial behavior. n287 So acceptance of the violence hypothesis does not establish that television violence is harmful to children viewers. And there seems to be little direct support for the latter hypothesis when understood as a separate question. Because the government cannot sustain its burden on the basis of available evidence, it is hard to imagine how a court could conclude that elimination of televised violence would serve - let alone accomplish - a compelling state interest in promoting the health and well-being of children. n288

-Footnotes-

n287. Of course, political systems often elude this difficulty by defining antisocial behavior to be pathological. Liberal societies do not.